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August 19, 2004

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The Honorable Jane Rodda
Administrative Law Judge
Arizona Corporation Commission
Hearings Division
1200 West Washington Street
Phoenix, AZ 85007

RE: Utilities Division Staff v. Eschelon Telecom of Arizona, Inc.
Docket No. T-03406A-03-0888

Dear Judge Rodda:

Enclosed for filing is an original and 13 copies of Brief of Eschelon Telecom of Arizona, Inc. in connection with the above-referenced matter.

Sincerely,

Arizona Corporation Commission
DOCKETED
AUG 20 2004
DOCKETED BY

Kim K. Wagner
Senior Legal Secretary
Eschelon Telecom, Inc.
(612) 436-6225 (direct)
(612) 436-6816 (fax)

Enclosures
cc: Service List

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MARC SPITZER, Chairman
WILLIAM A. MUNDELL, Commissioner
JEFF HATCH-MILLER, Commissioner
MIKE GLEASON, Commissioner
KRISTIN K. MAYES, Commissioner

Utilities Division Staff	)	DOCKET NO. T-03406A-03-0888
	)	
v.	)	
	)	
Eschelon Telecom of Arizona, Inc.	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Brief of Eschelon Telecom of Arizona, Inc. on all parties of record in this proceeding by mailing a copy thereof, properly addressed with first class postage prepaid to all parties on the attached service list.

Dated: August 19, 2004

Kim K. Wagner

Arizona Corporation Commission
Docket Control
1200 West Washington Street
Phoenix, AZ 85007-2927

Gary H. Horton
Arizona Corporation Commission
Legal Division
1200 West Washington Street
Phoenix, AZ 85007

Timothy Berg
Fennemore Craig
3003 North Central Avenue
Suite 2600
Phoenix, AZ 85012-2913

Christopher C. Kempley
Chief Counsel
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

Ernest G. Johnson
Director, Utilities Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

Jane Rodda, Administrative Law Judge
Hearing Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

Thomas H. Campbell
Lewis And Roca, LLP
40 North Central Avenue
Phoenix, AZ 85004

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BEFORE THE ARIZONA CORPORATION COMMISSION

MARC SPITZER, Chairman
WILLIAM A. MUNDELL, Commissioner
JEFF HATCH-MILLER, Commissioner
MIKE GLEASON, Commissioner
KRISTIN K. MAYES, Commissioner

Utilities Division Staff	)	DOCKET NO. T-03406A-03-0888
	)	
v.	)	
	)	
Eschelon Telecom of Arizona, Inc.	)	
	)	

BRIEF OF ESCHELON TELECOM OF ARIZONA, INC.

INTRODUCTION

Eschelon Telecom of Arizona, Inc. (Eschelon) submits this Brief in support of its Motion to Dismiss the Complaint of the Arizona Corporation Commission (Commission) Utilities Division (Staff) in the above-captioned proceeding. Eschelon submits that the Complaint does not state a cause of action against Eschelon under either state or federal law, and that some of the documents at issue do not, on their face, meet the definition of an interconnection agreement.

As will be shown, there is no requirement in the Act or in the FCC's rules or orders that competitive local exchange carriers (CLECs) like Eschelon had a legal duty to file interconnection agreements. Likewise there is no Arizona state statute or regulation that explicitly imposes that duty on CLECs. In fact, until October of 2002, when the FCC issued a Declaratory Ruling defining interconnection agreements, there was no

definitive definition of what constituted an interconnection agreement.[1] Since, under the Act, a state commission's regulatory authority over the terms of interconnection is very limited, it is not at all clear that this Commission has the authority to impose fines for an alleged violation of the Act, especially where, as here, there is no state statute requiring CLECs to file agreements and authorizing the Commission to impose fines for failure to do so. As the Supreme Court has stated: "[t]he question . . . is not whether the Federal Government has taken the regulation of local telecommunications competition away from the states. With regard to the matters addressed by the 1996 Act, it unquestionably has." AT&T Corp. v. Iowa Util. Board, 525 U.S. 366, 379 n.6 (1999). The question, then, is whether the Commission has, under the limited authority granted by the Act, a basis to penalize Eschelon for alleged violations of an implied duty under that Federal statute, where the federal government has not ruled that such a duty exists.

I. ESCHELON HAD NO LEGAL OBLIGATION TO FILE INTERCONNECTION AGREEMENTS.

The Complaint alleges that Eschelon violated 47 U.S.C.§ 252(e) of the Telecommunications Act of 1966 (the Act) and A.A.C. R14-2-1506 (A) and (C) by failing to file ten interconnection agreements with the Commission. To find that Eschelon violated the Act and those Commission regulations, the Commission would first have to rule that Eschelon had an obligation, at the time in question, to file interconnection agreements. Such an obligation is not explicitly stated in the Act or the federal regulations implementing it. To date there has been no determination by the FCC that CLECs have an obligation to file agreements. Eschelon is aware of only one state

[1] *Memorandum Opinion and Order*, WC Docket No. 02-89, FCC 02-276, October 4, 2002, (Declaratory Ruling), Exhibit 1, attached.

commission that has found such an obligation and that was not until February of 2004, in an interlocutory order.[2] Even in that case there has been no final state determination of CLEC culpability. The matter is currently scheduled for an evidentiary hearing in November, 2004.

A. Imposing a Duty to File Interconnection Agreements On CLECs Is Inconsistent with the Act.

There is no provision of the Act or the FCC's rules that impose the obligation to file interconnection agreements upon CLECs like Eschelon. While it is clear that incumbent local exchange carriers (ILECs), such as Qwest Corporation (Qwest) have such an obligation, neither the Act nor the FCC's rules implementing the Act explicitly impose any obligation to file agreements on CLECs. In fact, both the Act and FCC rules are remarkably devoid of any mention of CLEC obligations regarding the filing of such agreements. Since neither the Act nor the FCC's rules specify any CLEC obligation to submit agreements for approval, the determination of whether such a duty exists must be garnered from the context of the broader obligations imposed by the Act as interpreted by the FCC and in light of the unique obligations the Act imposes on ILECs.[3] Since placing the obligation to file the agreements solely on the ILEC is consistent with the fundamental public policy underlying the entirety of the Act and with FCC pronouncements concerning the Act, there is no reason to assume, absent some affirmative statement in the Act, that CLECs have that duty.

The Act places several obligations upon the ILECs, including the duty to provide nondiscriminatory access to network elements on an unbundled basis at any technically

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[2] See, Order No. 5, *Washington Utilities and Transportation Commission v. Advanced Telecom Group, Inc., et al*, Docket No. UT-03311, February 12, 2004, 2004 WL 346050, Wash.U.T.C. (Order No. 5).
[3] *See, e.g., 47 U.S.C. § 251(c).*

feasible point, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory and in accordance with the requirements of Section 252.[4] In placing these obligations on the ILEC, Congress recognized that the actions of the incumbents, as the wholesale provider of the services necessary for competition, held the key to determining whether competition would develop. The entity offering the services and facilities contained in interconnection agreements is the incumbent, not the CLEC. Since it is the ILEC that is making its services and elements available under these agreements it is the ILEC that must logically bear the obligation of filing the agreements.

B. The FCC Has Not Claimed that CLECs Have an Obligation to File Agreements.

Where, as in this case, Congress has not directly addressed the question at issue, it is appropriate to turn to the interpretation of the administrative agency charged with administering the statute in question. *United States v. 313.34 Acres of Land,* 923 F.2d 698, 701 (9th Cir., 1991). In this instance that agency is the Federal Communications Commission (FCC). In August of 1966, the FCC issued its First Report and Order to implement the Act and to adopt rules consistent with the Act.[5] Throughout its First Report and Order, and indeed in subsequent proceedings, the FCC recognizes that Congress has specifically designed the Act to address the ILECs' superior bargaining power and the ILECs' incentives (or lack thereof) for negotiating the terms of and actually providing services to competitive carriers.[6] The FCC noted that "as distinct from bilateral commercial negotiation, the new entrant comes to the table with little or nothing

[4] *47 U.S.C. § 251(c)(3).*
[5] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (First Report and Order),
[6] *See, e.g., First Report and Order,* ¶ 15.

the incumbent needs or wants."[7] At the same time, the new entrant is entirely dependent on the ILEC for the services required in order to enter the market. Given this, the FCC has appropriately focused on the obligations of the incumbents under the Act and has thus far declined to extend significant regulatory obligations to CLECs. Consistent with this the FCC has never explicitly imposed the obligation to file interconnection agreements upon CLECs and has given every indication that it did not intend to impose that obligation on CLECs.

For example, as part of its First Report and Order the FCC promulgated a rule to implement Section 252 (i) of the Act. That Section, sometimes known as the "pick and choose" provision of the Act, allows CLECs to opt-in to the interconnection agreements of others with the intent of preventing discrimination between CLECs, one of the primary reasons for the requirement to publicly file interconnection agreements.[8] The FCC's "pick and choose" rule provides, in relevant part:

> An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement.
>
> 47 CFR § 51.809 (1997). (Emphasis added).

The effect of this FCC rule is to place the duty to make available and thus to file agreements on the shoulders of the ILEC, since it is the ILEC that has the duty to make the terms of any interconnection agreement available to others.

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[7] *Id.*

[8] The FCC recently changed its interpretation that Section 252(i) permits "pick and choose" and promulgated a new rule that will soon be effective. That rule contains the same obligation as incumbent LECs to make agreements available. See FCC 04-164, *Second Report and Order*, CC Docket No. 1-338, Rel. July 13, 2000.

Other statements in the First Report and Order further confirm that it is the ILEC's obligation to make sure that agreements are available for opt-in. " . . . Incumbent LECs must permit third parties to obtain access under section 252(i) to any individual interconnection, service, or network element arrangement." *First Report and Order* ¶1314. (Emphasis added). "Moreover, incumbent LEC's efforts to restrict availability of interconnection, services or elements under section 252(i) must also comply with the 1996 Act's general nondiscrimination provisions." *Id* at ¶ 1315 (Emphasis added).

The FCC's recognition that the burden of filing agreements is on the ILEC is fully consistent with the Act's opt-in provisions. This is true because one party and one party alone knows of the existence of all interconnection agreements – the ILEC. It is the ILEC that is the one common party to all interconnection agreements. It is the ILEC that has the monopoly over access to the network. It is the ILEC that can often unilaterally enforce its views as to how to permit access to that network. It is the ILEC that knows whether it has extended terms more favorable to one competitor than to another. It is the ILEC, therefore, that properly has the duty and responsibility to file all interconnection agreements with the appropriate regulatory bodies.

C. The FCC Has Indicated That Section 252 of the Act Imposes No Duties on CLECs.

In contrast to the statements as to the ILECs' duty to file interconnection agreements is the lack of statements by the FCC imposing filing obligations on CLECs. In fact the FCC has made affirmative statements that support the argument that the filing obligation does not extend to CLECs. For example, in the FCC's discussion of Section 252(i) of the Act and the effect of its rule implementing the "pick and choose" provision

on the compliance duties imposed upon small entities, including CLECs, the FCC makes it clear that it is imposing no duties on CLECs.

Section 603 of the Regulatory Flexibility Act (RFA), 5 U.S.C. §603 requires the FCC to provide an analysis of whether or to what extent its proposed rules impose reporting, recordkeeping and other compliance requirements on "small entities," which in this case, includes CLECs.[9] It is in that context that the FCC states at Paragraph 1437 of its First Report and Order:

"Our decisions in this section of the Order do not subject any small entities to reporting, recordkeeping or other compliance requirements. Incumbent LECs, including small incumbent LECs, are required to file with state commissions all interconnection agreements entered into with other carriers, including adjacent incumbent LECs. Incumbent LECs must also permit third parties to obtain any individual interconnection, service or network element arrangement on the same terms and conditions as those contained in any agreement approved under section 252."

First Report and Order at ¶ 1437 (Emphasis added).

Thus the FCC states quite clearly that its rules implementing Section 252(i) do not impose any compliance requirements on small entities, like CLECs, noting that ILECs have the requirement to file all interconnection agreements entered into with other carriers.

The FCC has made other statements indicating that CLECs have no duty regarding Section 252 obligations. For example, in the course of its discussion regarding the options available for CLECs to gain access to the facilities or property of an incumbent LEC, the FCC noted that a CLEC could invoke the arbitration and negotiation procedures of Section 252 to gain such access. [10] In that regard the FCC stated: "We note that section 252 does not impose any obligations on utilities other than incumbent

[9] A small entity is defined as a telephone communications company with fewer than 1500 employees. First Report and Order at ¶ 1344. Eschelon Telecom, Inc. has a total of approximately 900 employees.
[10] *First Report and Order*, ¶ 1227.

LECs, and does not grant rights to entities that are not telecommunications providers."[11] (Emphasis added.) Thus the FCC has said that Section 252 imposes obligations only on incumbent LECs. Obviously, Eschelon cannot have violated a statute that does not impose any obligations upon it.

In contrast to its statements about the filing obligation of ILECs, the FCC has not made any statements placing such requirements on CLECs despite ample opportunity to do so. The most recent example is the Notice of Apparent Liability For Forfeiture, (NAL), FCC 04-57 (March 12, 2004),[12] that the FCC issued against Qwest for failure to file forty-six (46) interconnection agreements. In the NAL the FCC discussed at some length many unfiled agreements and found that Qwest had violated the Act in regard to those agreements. Despite its acknowledgement of agreements involving dozens of CLECs, the FCC made no findings of any violations of law by the CLECs involved and announced no fines for any of those CLECs. By contrast, the FCC explicitly affirmed the ILEC's obligation to file such agreements: "Under Section 252(a)(1), LECs must file interconnection agreements with state commissions for approval." NAL, ¶ 33.[13]

The NAL and the Declaratory Ruling discuss at some length the purpose of the filing requirement which is to open up local markets to competition by making interconnection with the ILEC available to CLECs. Thus the FCC again recognizes, as stated in its rules, that it is the incumbent LEC who has the obligation to make interconnection, services and network elements available to CLECs. Placing the filing requirement on the ILEC is consistent with this obligation. In conclusion, there is no basis for the allegation that Eschelon had a duty, under Section 252(e) of the Act, to file

[11] *Id.*, ¶ 1230.
[12] Attached as Exhibit 2.
[13] In the NAL the FCC defines LEC as "an incumbent local exchange carrier." NAL, p. 1, fn. 1.

the agreements in question. The Complaint does not and cannot cite to a single section of the Act, a FCC Rule or a FCC Order stating that Eschelon had the obligation to file interconnection agreements. Therefore, the allegation of a violation of Section 252(e) of the Act should be dismissed for failure to state a claim.

D. State Law Does Not Require CLECs to File Interconnection Agreements.

The Complaint also alleges that Eschelon violated A.A.C. R14-2-1506 (A) and (C) by not filing the alleged amendments to its interconnection agreement with the Commission. The Complaint alleges no violation of a state statute, as there is no state statute that addresses the filing of interconnection agreements with the Commission. Rather, Eschelon is charged with a violation of a rule that purports to enforce a federal statute. As with the Act and the FCC rules, this rule makes no explicit reference to CLEC obligations, nor does it provide that all parties to an interconnection agreement have the obligation to file it. The only mandate regarding the filing of an interconnection agreement is in Subsection A of the rule which is, like the Act, stated in the passive voice and references that the filing must be made under Section 252(e) of the Act.[14] As explained above, Section 252(e) of the Act requires ILECs to file interconnection agreements with the states for approval, it does not require CLECs like Eschelon to file interconnection agreements. Since the Commission's rule is intended to implement the Act, from which it derives its authority regarding interconnection agreements, and since there is no state statute that addresses the filing of interconnection agreements, the rule cannot require something more or different than the Act.

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[14] Since Qwest and Eschelon already had an approved interconnection agreement on file with the Commission at the time of the alleged agreements, the items at issue would be amendments to that agreement and thus would have been filed pursuant to R14-2-1508 rather than R-14-2-1506.

The Complaint also alleges that Eschelon violated A.A.C. R14-2-1506(C). However, Subsection (C) adds no additional requirement to Subsection (A) and in contrast to Subsection (A) which uses the mandatory "shall" regarding the filing of an agreement, Subsection (C) contains permissive language. Like Subsection (B) of the rule, which provides that any party to the agreement "may" submit a request for approval, Subsection (C) provides that documentation supporting a filing "can be filed jointly or separately by the parties." (Emphasis added.) Use of the word "can" indicates this is not a mandatory requirement but a permissive one. See *Robards v. Gaylord Bros., Inc.*, 854 F. 2d 1152, 1157 (9th Cir. 1988) (use of the word "can" in jury instruction is permissive rather than compulsory). Thus, different sections of the rule use the permissive "may" or "can," while other sections use "shall" which is generally considered mandatory. Where both a mandatory and discretionary term are used it is assumed that the intent was that each term carry its ordinary meaning. *Walter v. Wilkinson*, 198 Ariz. 431, 10 P.3d 1218, 1219 (App. 2000). Thus while Subsection (C) allows for filings by Eschelon, it does not mandate any action by Eschelon and an alleged failure to act under this Subsection cannot be the basis for a finding of a violation.

Because A.A.C. R14-2-1506 (A) and (C) were promulgated to enforce the Act and since the Act does not require CLECs to file interconnection agreements, this rule cannot be interpreted to require CLECs to file interconnection agreements. Because neither the statutes nor the rules require CLECs to file interconnection agreements, Eschelon cannot be found to have violated such a requirement and no action against it can be taken under state law.

Finally because neither the Act nor state statutes grant the Commission the authority to impose monetary fines on Eschelon under 47 U.S.C. §§ 252 (e), the Complaint, which is based on alleged violations of that section of the Act, must fail.

II. DISMISSAL IS APPROPRIATE AS TO DOCUMENTS THAT DO NOT MEET THE DEFINITION OF AN INTERCONNECTION AGREEMENT.

As discussed above, Eschelon disputes that it had an obligation to file interconnection agreements with the Commission. However, even if it did have such an obligation, certain of the agreements cited by Staff do not meet the definition of an interconnection agreement. The Complaint, at Table One, lists ten documents that are alleged to be interconnection agreements that Eschelon should have filed with the Commission. Eschelon believes that it will be able to show: (1) that certain documents do not meet the definition of an interconnection agreement; (2) that relevant portions of certain documents were properly filed and approved by the Commission as part of an amendment to the interconnection agreement and (3) that certain agreements were not required to be filed under the terms of the parties' interconnection agreement. While some of these will require factual explanation and thus development of an evidentiary record, the following two documents do not meet the definition of an interconnection agreement on their face and therefore should be dismissed.[15]

[15] For purposes of this Brief Eschelon is using the definition of an interconnection agreement stated by the FCC in its Declaratory Ruling at ¶ 8--"an agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation..."

A. Document No. 7-Features Letter from Qwest.

Document No. 7 is a letter from Qwest to Eschelon. (Exhibit 3.) It is related to Amendment No. 7 to the parties' interconnection agreement in Arizona which was filed with and approved by the Commission on February 2, 2001, in Decision No. 63336. (Ex. 4, attached). That Amendment provided for a UNE Platform, known as "UNE-E" that includes a list of features that are available and included as part of the flat UNE-E rate. (See, Exhibit 4, Attachment 3.2). Amendment 7 was signed on November 15, 2000. As that amendment was being finalized, on November 13, 2000, Bob Pickens, Executive Vice President of Marketing for Eschelon, made an inquiry to Qwest about the pricing of some other features that were not included in the flat rate, and about whether the pricing would differ depending on whether the feature is on a Centrex 21 line or a POTs line. (See Exhibit 5). In response to this inquiry by Eschelon, Qwest sent Document No. 7. It contained the rates Qwest claimed were applicable to certain features, not explicitly mentioned in the UNE-E Amendment, when ordered with the UNE Platform. However, after reviewing Document No. 7 in some detail, Eschelon concluded that it did not agree with several of Qwest's assertions in this letter as to what rates applied and when.[16] In fact, Eschelon disputed the applicability of these rates when they were included in bills to Eschelon. Thus, while Document 7 may include some of the elements of an interconnection agreement as defined by the FCC it has one major omission -- agreement by Eschelon. Therefore Document 7 is a unilateral statement of Qwest's position, not an agreement between the parties. Eventually an agreement was reached and that agreement

[16] See Exhibit 6, Affidavit of Bob Pickens, attached.

was reflected in two filed amendments to the interconnection agreement that were approved by the Commission. (See Exhibits 7 and 8.)

In summary, this letter reflects no agreement between the parties, is not an interconnection agreement and should be dismissed from this proceeding.

B. Document No. 8-Confidential Billing Settlement Agreement.

Document No. 8 (Exhibit 9) is a settlement of disputes and a statement of an agreement to agree. As stated in the agreement, Eschelon and Qwest had a dispute about the provisioning of finished services through unbundled network elements and through the UNE platform. The agreement provided for a one-time payment from Eschelon to Qwest for charges that Qwest claimed Eschelon owed it for conversion charges and termination liability charges associated with conversion of customers from resale to UNE Platform. To the extent that settlement of this issue can be considered an interconnection agreement, its existence cannot have violated the Act or the Commission's rules because the term was also reflected in a publicly filed and Commission-approved interconnection agreement amendment. See Amendment 7, Ex. 4, at ¶ 2.1.

The only other provisions of this agreement consist of a general statement of what Eschelon will receive as part of the UNE-E Platform. However, this was a recitation of what Eschelon (and other CLECs) would be entitled to when purchasing a UNE Platform whether or not this document existed. Furthermore, this term was included in the filed and approved Amendment No. 7 at ¶¶3.2, 3.3. Thus, this agreement did not create any ongoing obligations regarding Section 251(b) and (c) services, it merely recited obligations that already existed elsewhere or promises to agree in the future. Therefore, this is not an interconnection agreement as defined in the FCC's Declaratory Ruling and

was not required to be filed with the Commission. It should be dismissed from this action.[17]

CONCLUSION

The Complaint should be dismissed because Eschelon had no duty to file interconnection agreements with the Commission and therefore has not violated Section 252(e) of the Act or A.A.C. R-14-2-1506 (A) and (C). In the alternative, Documents 7 and 8 on Table One of the Complaint should be dismissed from this matter because they do not constitute interconnection agreements.

Respectfully submitted,

Dennis D. Ahlers
Senior Attorney
Eschelon Telecom, Inc.
730 2nd Avenue South, Suite 900
Minneapolis, MN 55402-2456
(612) 436-6692 (Direct)
(612) 436-6792 (Fax)
ddahlers@eschelon.com

Attorney for Eschelon Telecom, Inc.

[17] The Washington Commission dismissed this agreement (Agreement No. 22 in Washington) from its unfiled agreements proceeding, finding that it did not meet the FCC's definition of an interconnection agreement. See Order No. 5, ¶ 192, p.56.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Qwest Communications International Inc.	)	
Petition for Declaratory Ruling on the Scope	)	WC Docket No. 02-89
of the Duty to File and Obtain Prior Approval	)	
of Negotiated Contractual Arrangements	)	
under Section 252(a)(1)	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 2, 2002 **Released:** October 4, 2002

By the Commission:

I. INTRODUCTION

1. On April 23, 2002, Qwest Communications International Inc. (Qwest) filed a petition for a declaratory ruling on the scope of the mandatory filing requirement set forth in section 252(a)(1) of the Communications Act of 1934, as amended (the Act).[1] Specifically, Qwest seeks guidance about the types of negotiated contractual arrangements between incumbent local exchange carriers (LECs) and competitive LECs that should be subject to the filing requirements of this section.[2] For the reasons explained below, we grant in part and deny in part Qwest's petition.

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[1] 47 U.S.C. § 252(a)(1). *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89 (filed April 23, 2002) (Qwest Petition).

[2] Qwest Petition at 3. The Commission requested and received comments on the Qwest Petition. *See* Pleading Cycle Established for Comments on Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1), WC Docket No. 02-89, *Public Notice*, DA 02-976 (rel. April 29, 2002). The following parties submitted comments: AT&T Corp. (AT&T); Office of the Attorney General of the State of New Mexico and the Iowa Office of Consumer Advocate; Focal Communications Corporation and Pac-West Telecomm, Inc.; Iowa Utilities Board; Minnesota Department of Commerce; Mpower Communications Corp. (Mpower); New Edge Network, Inc.; PageData; Sprint Corporation (Sprint); Touch America, Inc. (Touch America); and WorldCom, Inc. (WorldCom). The following parties filed reply comments: Association of Communications Enterprises; Association for Local Telecommunications Services (ALTS); PageData; Qwest; Sprint; Verizon; VoiceStream Wireless Corporation; and WorldCom.

II. BACKGROUND

2. Section 252(a)(1) of the Act states:

> Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement . . . shall be submitted to the State commission under subsection (e) of this section.[3]

Qwest argues that this section can most logically be read to mean that the mandatory filing and state commission approval process should apply only to the "rates and associated service descriptions for interconnection, services and network elements."[4] More precisely, Qwest contends that a negotiated agreement should be filed for state commission approval if it includes: (i) a description of the service or network element being offered; (ii) the various options available to the requesting carrier (*e.g.,* loop capacities) and any binding contractual commitments regarding the quality or performance of the service or network element; and (iii) the rate structures and rate levels associated with each such option (*e.g.,* recurring and non-recurring charges, volume or term commitments).[5]

3. According to Qwest, the following categories of incumbent LEC-competitive LEC arrangements should not be subject to section 252(a)(1): (i) agreements defining business relationships and business-to-business administrative procedures (*e.g.*, escalation clauses, dispute resolution provisions, arrangements regarding the mechanics of provisioning and billing, arrangements for contacts between the parties, and non-binding service quality or performance standards);[6] (ii) settlement agreements;[7] and (iii) agreements regarding matters not subject to sections 251 or 252 (*e.g.,* interstate access services, local retail services, intrastate long distance, and network elements that have been removed from the national list of elements subject to

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[3] 47 U.S.C. § 252(a)(1).

[4] Qwest Petition at 10. Qwest contends that its interpretation of section 252(a)(1) is supported by the legislative history of the Telecommunications Act of 1996. *Id.* at 13-14.

[5] Qwest Petition at 29. Qwest also indicates that a description of basic operations support systems functionalities and options to which the parties have agreed should be filed and subjected to state commission approval. *Id.* at 29-30.

[6] Qwest Petition at 31-34.

[7] Qwest Petition at 34-36.

mandatory unbundling).[8]

4. Qwest states that a Commission ruling on this issue will eliminate the prospect of multiple, inconsistent rulings by state commissions and federal courts.[9] Qwest argues that a national policy concerning what must be filed under section 252(a)(1) is necessary to promote local competition, facilitate multi-state negotiations,[10] and prevent overbroad interpretations of this filing requirement.[11] According to Qwest, an overbroad interpretation would reduce the incentives of incumbents and competitive LECs to implement bilateral arrangements that could benefit both parties. For example, Qwest states that the public disclosure of contractual provisions such as settlements of past disputes might discourage the parties from entering into such arrangements.[12] Qwest also contends that an overbroad reading of section 252(a)(1) creates legal uncertainty with respect to the validity of agreements that have not gone through the prior state commission approval process.[13]

5. Most commenters oppose Qwest's petition,[14] arguing that it is unnecessary and that Qwest's proposal interprets too narrowly which agreements must be filed under section 252(a)(1).[15] For example, several commenters argue that service quality and performance standards relate to interconnection and are therefore appropriately included in interconnection agreements.[16] Commenters also contend that competitive LECs need dispute resolution, billing and provisioning provisions in their interconnection agreements.[17] The commenters also disagree with Qwest's view that only certain portions of agreements (related to section 251(b) or (c)) need to be filed for state commission approval and argue instead that the entire agreement

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8 Qwest Petition at 36-37.

9 Qwest Petition at 5.

10 Qwest Petition at 27.

11 Qwest Petition at 22.

12 Qwest Petition at 22.

13 Qwest Petition at 17-18, 23.

14 We note that Verizon filed comments to respond to, in its view, inaccurate statements made by certain commenters. *See* Verizon Reply at 1, 2-3.

15 *See, e.g.*, AT&T Comments at 16-18; Minnesota Department of Commerce Comments at 32-34; WorldCom Comments at 7; ALTS Reply at 4.

16 WorldCom Comments at 7; ALTS Reply at 4.

17 WorldCom Comments at 7; ALTS Reply at 4. Verizon, however, argues that agreements for unregulated services such as billing and collection are not interconnection agreements that must be filed under section 252. Verizon Reply at 2.

must be filed for state commission review and approval.[18]

6. The commenters dispute Qwest's assertions concerning the burden of "overfiling" agreements for state commission approval[19] and disagree with Qwest's interpretation of the legal status of agreements not filed under section 252 or not yet approved by state commissions under the same section.[20] Specifically, these commenters contend that nothing in section 252, or any other provision of the Act, provides that the parties are prohibited from abiding by the agreement's terms until a state commission completes its review of the negotiated agreement.[21] Moreover, according to AT&T, not only does the 90-day approval process not present any legal impediment to parties that would like to begin operating under the terms of a negotiated agreement prior to state commission approval, there is no practical impediment (*e.g.*, compliance jeopardy) because interconnection agreements are rarely rejected.[22]

III. DISCUSSION

7. We grant in part and deny in part Qwest's petition for a declaratory ruling. In issuing this decision, however, we believe that the state commissions should be responsible for applying, in the first instance, the statutory interpretation we set forth today to the terms and conditions of specific agreements. Indeed, we believe this is consistent with the structure of section 252, which vests in the states the authority to conduct fact-intensive determinations relating to interconnection agreements.[23]

8. We begin our analysis with the statutory language. Section 252(a)(1) provides that the binding agreement between the incumbent LEC and the requesting competitive LEC must include a "detailed schedule of itemized charges for interconnection and each service or network element included in the agreement."[24] In addition, section 251(c)(1) requires incumbent LECs to negotiate in good faith, in accordance with section 252, the particular terms and conditions of agreements to implement their duties set forth in sections 251(b) and (c).[25] Based on these

[18] AT&T Comments at 4, 6-9; Mpower Comments at 7; Sprint Comments at 3; WorldCom Comments at 6; ALTS Reply at 2.

[19] *See, e.g.*, AT&T Comments at 13; Sprint Comments at 3.

[20] AT&T Comments at 12; Minnesota Department of Commerce Comments at 38.

[21] AT&T Comments at 12; Minnesota Department of Commerce Comments at 38.

[22] AT&T Comments at 12-13, citing Qwest Petition at 9.

[23] As an example of the substantial implementation role given to the states, throughout the arbitration provisions of section 252, Congress committed to the states the fact-intensive determinations that are necessary to implement contested interconnection agreements. *See, e.g.*, 47 U.S.C. § 252(e)(5) (directing the Commission to preempt a state commission's jurisdiction only if that state commission fails to act to carry out its responsibility under section 252).

[24] 47 U.S.C. § 252(a)(1).

[25] 47 U.S.C. § 251(c)(1).

statutory provisions, we find that an agreement that creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1).[26] This interpretation, which directly flows from the language of the Act, is consistent with the pro-competitive, deregulatory framework set forth in the Act. This standard recognizes the statutory balance between the rights of competitive LECs to obtain interconnection terms pursuant to section 252(i) and removing unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs. We therefore disagree with Qwest that the content of interconnection agreements should be limited to the schedule of itemized charges and associated descriptions of the services to which the charges apply. Considering the many and complicated terms of interconnection typically established between an incumbent and competitive LEC, we do not believe that section 252(a)(1) can be given the cramped reading that Qwest proposes. Indeed, on its face, section 252(a)(1) does not further limit the types of agreements that carriers must submit to state commissions.

9. We are not persuaded by Qwest that dispute resolution and escalation provisions are *per se* outside the scope of section 252(a)(1).[27] Unless this information is generally available to carriers (*e.g.*, made available on an incumbent LEC's wholesale web site), we find that agreements addressing dispute resolution and escalation provisions relating to the obligations set forth in sections 251(b) and (c) are appropriately deemed interconnection agreements. The purpose of such clauses is to quickly and effectively resolve disputes regarding section 251(b) and (c) obligations. The means of doing so must be offered and provided on a nondiscriminatory basis if Congress' requirement that incumbent LECs behave in a nondiscriminatory manner is to have any meaning.[28]

10. Based on their statutory role provided by Congress and their experience to date, state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an "interconnection agreement" and, if so, whether it should be approved or rejected. Should competition-affecting inconsistencies in state decisions arise, those could be brought to our attention through, for example, petitions for declaratory ruling. The statute expressly contemplates that the section 252 filing process will occur with the states,

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[26] We therefore disagree with the parties that advocate the filing of *all* agreements between an incumbent LEC and a requesting carrier. *See* Office of the New Mexico Attorney General and the Iowa Office of Consumer Advocate Comments at 5. Instead, we find that only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1). Similarly, we decline Touch America's suggestion to require Qwest to file with us, under section 211, all agreements with competitive LECs entered into as "settlements of disputes" and publish those terms as "generally available" terms for all competitive LECs. Touch America Comments at 10, citing 47 U.S.C. § 211.

[27] Qwest Petition at 31-33.

[28] We note that Qwest has filed for state commission approval agreements containing both dispute resolution provisions and escalation clauses. *See, e.g.,* Qwest Supplemental Reply, WC Docket No. 02-148, at 26-27 (filed Aug. 30, 2002). We incorporate by reference this document into the record in the instant proceeding.

and we are reluctant to interfere with their processes in this area. Therefore, we decline to establish an exhaustive, all-encompassing "interconnection agreement" standard. The guidance we articulate today flows directly from the statute and serves to define the basic class of agreements that should be filed. We encourage state commissions to take action to provide further clarity to incumbent LECs and requesting carriers concerning which agreements should be filed for their approval. At the same time, nothing in this declaratory ruling precludes state enforcement action relating to these issues.[29]

11. Consistent with our view that the states should determine in the first instance which sorts of agreements fall within the scope of the statutory standard, we decline to address all the possible hypothetical situations presented in the record before us. We are aware, however, of some disagreement concerning interconnection agreement issues raised recently in another proceeding previously before the Commission.[30] Consequently, we determine that additional, specific guidance on these issues would be helpful.

12. The first matter concerns which settlement agreements, if any, must be filed under section 252(a)(1). We disagree with the blanket statement made by Qwest in its petition that "[s]ettlement agreements that resolve disputes between ILECs and CLECs over billing or other matters are not interconnection agreements under Section 252."[31] Instead, and consistent with the guidance provided above, we find that a settlement agreement that contains an ongoing obligation relating to section 251(b) or (c) must be filed under section 252(a)(1). Merely inserting the term "settlement agreement" in a document does not excuse carriers of their filing obligation under section 252(a) or prevent a state commission from approving or rejecting the agreement as an interconnection agreement under section 252(e). However, we also agree with Qwest that those settlement agreements that simply provide for "backward-looking consideration" (*e.g.*, the settlement of a dispute in consideration for a cash payment or the cancellation of an unpaid bill) need not be filed.[32] That is, settlement contracts that do not affect

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[29] This statement also applies to any state enforcement action involving previously unfiled interconnection agreements including those that are no longer in effect.

[30] *Application by Qwest Communications International Inc., Consolidated Application for Authority to Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska and North Dakota*, WC 02-148 (filed June 13, 2002). *See also* Letter from Peter A. Rohrbach, Counsel for Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-148, 02-189 (filed Sept. 10, 2002) (withdrawing Qwest's joint applications filed in both dockets); *Application by Qwest Communications International Inc., Consolidated Application for Provision of In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska and North Dakota*, WC Docket No. 02-148, *Application by Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Montana, Utah, Washington and Wyoming*, WC Docket No. 02-189, Order, DA 02-2230 (rel. Sept. 10, 2002) (terminating both Qwest section 271 dockets).

[31] Qwest Petition at 34.

[32] Qwest Reply at 25-26. *See also* Minnesota Department of Commerce Comments at 6-7 (stating that it did not include in its complaint against Qwest filed with the Minnesota Public Utilities Commission "settlement agreements of what appear to be legitimate billing disputes").

an incumbent LEC's ongoing obligations relating to section 251 need not be filed.

13. Qwest has also argued, in another proceeding, that order and contract forms used by competitive LECs to request service do not need to be filed for state commission approval because such forms only memorialize the order of a specific service, the terms and conditions of which are set forth in a filed interconnection agreement.[33] We agree with Qwest that forms completed by carriers to obtain service pursuant to terms and conditions set forth in an interconnection agreement do not constitute either an amendment to that interconnection agreement or a new interconnection agreement that must be filed under section 252(a)(1).

14. Further, we agree with Qwest that agreements with bankrupt competitors that are entered into at the direction of a bankruptcy court or trustee and do not otherwise change the terms and conditions of the underlying interconnection agreement are not interconnection agreements or amendments to interconnection agreements that must be filed under section 252(a)(1) for state commission approval.[34] We are unaware of any carrier submitting such agreements for state commission approval under section 252. Directing carriers to do so has the potential to raise difficult jurisdictional issues between the bankruptcy court and regulators and could entangle carriers in inconsistent and, possibly, conflicting requirements imposed by state commissions, bankruptcy courts, and this Commission.

IV. ORDERING CLAUSE

15. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 251, 252 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 251, 252, and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that Qwest's Petition for Declaratory Ruling IS GRANTED IN PART and IS DENIED IN PART.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[33] Letter from Peter A. Rohrbach, Counsel for Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-148, 02-189, at 2-3 (filed Sept. 5, 2002). We incorporate by reference this letter into the record in the instant proceeding. *See also* Minnesota Department of Commerce Comments at 7 (stating that it also did not include in its complaint "day-to-day operational agreements that implement specific provisions of interconnection agreements" such as collocation agreements and applications for access to poles, ducts, conduits, and rights of way).

[34] Qwest Supplemental Reply, WC Docket No. 02-148, at 19-20 n.29 (filed Aug. 30, 2002).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Qwest Corporation	)	File No. EB-03-IH-0263
	)	NAL Acct. No. 200432080022
Apparent Liability for Forfeiture	)	FRN No. 0001-6056-25
	)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 11, 2004 **Released:** March 12, 2004

By the Commission: Chairman Powell issuing a statement.

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL") we find that Qwest Corporation ("Qwest")[1] is apparently liable for willfully and repeatedly violating its statutory obligations in section 252(a)(1) of the Communications Act of 1934, as amended (the "Act")[2] by failing to file 46 interconnection agreements with the Minnesota Public Utilities Commission ("Minnesota Commission") and Arizona Corporation Commission ("Arizona Commission") for approval under section 252.[3] Based on our review of the facts and circumstances surrounding this matter, we find that Qwest is apparently liable for a total forfeiture of $9 million.

2. We propose a forfeiture of such size against Qwest because of Qwest's disregard for the filing requirements of section 252(a) of the Act and the Commission's orders and the potential anticompetitive effects of Qwest's conduct. Qwest's failure to comply with section 252(a) of the Act undermines the effectiveness of the Act and our rules by preventing

[1] Qwest Corporation, an incumbent local exchange carrier ("LEC") that provides local telephone service in 14 midwestern and western states, was formerly US West, Inc. (one of the original Regional Bell Operating Companies). *See Qwest Communications International Inc. and US West, Inc., Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket 99-272, Memorandum Opinion and Order, 15 FCC Rcd 5376 (2000); Memorandum Opinion and Order, 15 FCC Rcd 11909 (2000). References to Qwest include its predecessor, US West, Inc.

[2] 47 U.S.C. § 252(a)(1).

[3] As discussed below, these agreements were executed several years earlier, but not filed with the state commissions pursuant to section 252(a)(1) of the Act until mid-2003. *See infra* nn.81 & 83.

competitive LECs (or "CLECs") from adopting interconnection terms otherwise available only to certain favored CLECs. Despite our clear and repeated instruction regarding the section 252(a) filing obligations, Qwest apparently withheld dozens of interconnection agreements from state commissions until it was ready to seek our approval to provide in-region, interLATA service for the relevant states.[4] In Minnesota and Arizona, the last two states for which Qwest sought section 271 approval, Qwest delayed filing 46 interconnection agreements until several years after the agreements were executed and months after filing similar agreements in other states. These agreements were filed long after we had clarified, and reiterated, the filing requirements of section 252(a)(1). Indeed, months after Qwest assured us that it had filed all of its previously unfiled interconnection agreements, Qwest filed an additional 53 agreements in six states, some of which date back to 1998.[5]

3. Qwest's actions are egregious because, according to Qwest documents, Qwest company policy since May 2002 explicitly requires filing such agreements with the state commissions, in compliance with section 252(a). Rather than filing the agreements at issue here, however, Qwest withheld them apparently until it was ready to seek section 271 approval from the Commission. As we discuss below, Qwest admits that its decision to file its 34 unfiled agreements in Minnesota "was influenced by the fact that it was preparing to file its application for 271 authority in Minnesota."[6] Qwest further admits that the impetus for filing twelve previously unfiled agreements with the Arizona Commission was not to comply with the Act but rather because "[b]y May, Qwest was less concerned that such a filing might be treated as an admission of liability and result in material penalties."[7] Qwest's cavalier attitude toward the Act's filing requirements shows a disregard for Congress's goals of opening local markets to competition and permitting interconnection on just, reasonable, and nondiscriminatory terms. As we have stated previously, we "consider any filing delays to be extremely serious."[8] The

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[4] In the 1996 amendments to the Act, Congress required Bell Operating Companies ("BOCs") to demonstrate compliance with certain market-opening requirements in section 271 of the Act before providing in-region, interLATA service. *See* 47 U.S.C. § 271(d)(2)(A), (B). On June 13, 2002, Qwest Communications International Inc. filed section 271 multi-state applications for authorization to provide in-region, interLATA service in Colorado, Idaho, Iowa, Nebraska, and North Dakota ("Qwest I"); and on July 12, 2002, for Montana, Utah, Washington, and Wyoming ("Qwest II"). Many of the *ex parte* letters and other documents cited in this NAL were filed in one or both of those dockets. At times, herein, Qwest Communications International Inc. and Qwest Communications Corporation are referred to as "Qwest."

[5] *See infra* para. 17 & n.61.

[6] Qwest Memo at 12. The Qwest Memo was part of Qwest's response to the Bureau's letter of inquiry. *See infra* n.21.

[7] Qwest Memo at 13.

[8] *See Application by SBC Communications Inc., Michigan Bell Telephone Company, and Southwestern Bell Communications Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Michigan*, WC Docket No. 03-138, Memorandum Opinion and Order, 18 FCC Rcd 19024, 19123, ¶ 180 (2003) ("*SBC Michigan 271 Order*"). In the *SBC Michigan 271 Order*, we said that incumbent LECs had adequate notice of their legal obligations under section 252(a) and that we would consider appropriate enforcement action when carriers fail to meet these obligations. *Id.*

forfeiture we propose here today reflects the gravity and scope of Qwest's apparent violations.

II. BACKGROUND

4. Section 252(a)(1) of the Communications Act requires incumbent LECs to negotiate interconnection agreements with CLECs.[9] Once finalized, the agreements must be submitted to state commissions for approval under section 252(e).[10] As we observed in the *Local Competition Order*,

> requiring filing of all interconnection agreements best promotes Congress's stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable, and nondiscriminatory terms. State commissions should have the opportunity to review *all* agreements . . . to ensure that such agreements do not discriminate against third parties, and are not contrary to the public interest.[11]

After an interconnection agreement is approved by the state commission, other carriers may adopt the terms, conditions, and rates in the agreement pursuant to section 252(i).[12]

5. For more than two years, we and states throughout Qwest's region have examined whether Qwest has violated its statutory duty to file its interconnection agreements. This scrutiny began during the summer of 2001, when the Minnesota Department of Commerce ("Minnesota DOC") sought to determine if Qwest was engaging in anticompetitive conduct.[13] On February 14, 2002, the Minnesota DOC filed a complaint with the Minnesota Commission claiming Qwest had violated state and federal law by not seeking section 252 approval for eleven agreements between Qwest and competitive LECs.[14] Soon thereafter, several other state commissions in Qwest's region, including the Arizona Commission, initiated similar investigations.[15]

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[9] 47 U.S.C. § 252(a)(1).

[10] 47 U.S.C. § 252(e).

[11] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15583, ¶ 167 (1996) (subsequent history omitted, emphasis in original) ("*Local Competition Order*").

[12] 47 U.S.C. § 252(i). *See also* 47 C.F.R. § 51.809(a). One of the key purposes of the section 252(a) filing requirement is that carriers will know which interconnection agreements (and terms) are available under section 252(i).

[13] *See* Findings of Fact, Conclusions, Recommendation and Memorandum, Minn. Docket No. P-421/C-02-197 at 10 (Sept. 20, 2002).

[14] *Id.*

[15] For a summary of the state investigations into unfiled agreements in the first nine application states, see *Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Docket No. 02-314, Memorandum Opinion and Order, 17 FCC Rcd 26303, 26559-66, ¶¶ 460-471 (2002) ("*Qwest 9-State 271 Order*"). For a summary of the state investigations into unfiled agreements in New (continued....)

6. As the state investigations proceeded, Qwest filed a petition with this Commission on April 23, 2002, seeking a declaratory ruling on what types of agreements between incumbent LECs and their competitors are subject to the mandatory filing and state commission approval requirements of section 252.[16] Qwest argued that section 252(a)(1) required filing and state approval only for a "schedule of itemized charges" and related service descriptions.[17]

7. Notwithstanding the position taken in its petition, in May 2002, Qwest informed the state commissions in its region of a new policy of filing all new "contracts, agreements, and letters of understanding" between Qwest and competitive LECs that "create obligations to meet the requirements of Section 251(b) or (c) on a going-forward basis."[18] Qwest also announced the formation of a "new committee comprised of senior managers from Legal Affairs, Public Policy, Wholesale Business Development, Wholesale Service Delivery, and Network as well as a Policy and Law Regulatory Attorney" to review and determine whether Qwest must file particular

(Continued from previous page)
Mexico, Oregon, and South Dakota, see *Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota,* WC Docket No. 03-11, Memorandum Opinion and Order, 18 FCC Rcd 7325, 7397-400, ¶¶ 127-131 (2003) ("*Qwest 3-State 271 Order*").

More recently, the Washington Utilities and Transportation Commission ("Washington Commission") initiated an enforcement proceeding against Qwest and thirteen CLECs, alleging, *inter alia,* that Qwest and the other carriers had not filed all their interconnection agreements for state review; that Qwest had given certain carriers an undue or unreasonable preference; that Qwest had discriminated against carriers; and that carriers had agreed not to oppose Qwest positions in various proceedings. *See Washington Utilities and Transportation Commission, v. Advanced Telecom Group, Inc., et al.*, Complaint and Notice of Prehearing Conference (Sept. 8, 2003), Docket No. UT-033011, filed Aug. 13, 2003. The Washington Commission also issued an order regarding section 252(e)(1) filing requirements. *See Washington Utilities and Transportation Commission, v. Advanced Telecom Group, Inc., et al.*, Order Granting Commission Staff's Motion for Partial Summary Determination; Granting in Part and Denying in Part the Motions to Dismiss and for Summary Determination of Qwest, ATG, AT&T/TCG, Eschelon, Fairpoint, Global Crossing, Integra, MCI, McLeodUSA, SBC, and XO (Feb. 12, 2004). In addition, the staff of the Colorado Public Utilities Commission submitted initial comments in Docket No. 02I-572T, "In the Matter of the Investigation into Unfiled Agreements Executed by Qwest Corporation," (Feb. 27, 2004), recommending, *inter alia*, that the Colorado Commission conduct a hearing on Qwest's willful and intentional violations of state and federal law.

[16] Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1), WC Docket No. 02-89 (filed Apr. 23, 2002) ("Qwest Petition").

[17] Qwest Petition at 6.

[18] *See* Letter from Peter A. Rohrbach, Mace J. Rosenstein, Yaron Dori, Attorneys for Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-148 (filed Aug. 13, 2002) (including letters to the commissions of Colorado, Idaho, Iowa, Nebraska, and North Dakota the Qwest I application states and the Larry Brotherson Qwest I Reply Declaration ("Brotherson Declaration")). Qwest's letters to the state commissions provided that: (1) Qwest would file all agreements with CLECs that create obligations to meet the requirements of section 251(b) or (c) on a going forward basis and (2) Qwest was forming a committee to review such agreements with CLECs and make the necessary filings. *See* Documents Q-PUB-000449 through Q-PUB-000477. The Commission sought comment on Qwest's proposal. *See* "Comments Requested in Connection with Qwest's Section 271 Application for Colorado, Idaho, Iowa, Nebraska, and North Dakota," *Public Notice*, 17 FCC Rcd 16234 (2002).

agreements under section 252.[19] According to Qwest, "[t]hrough the new committee process, and the broad standard it applies, Qwest is ensuring that it will file and obtain necessary PUC approval for all future negotiated agreements with CLECs."[20]

8. On August 1, 2002, this committee referred to in Qwest documents as the "Wholesale Agreement Review Committee" met via conference call. According to various drafts of the minutes of this meeting, the committee discussed the treatment of new agreements versus preexisting agreements.[21] The minutes indicate that Qwest had decided to treat pre-existing unfiled agreements differently from new agreements.[22] According to an early draft of the minutes, "[p]ast ancillary agreements are being handled by the litigation team. Going forward, all future ancillary agreements are to be filed with the respective state commission(s) out of an abundance of caution though they may be 'form contracts' not subject to [section] 252."[23] The minutes also state: "Issue: do we need to go back and file old agreements handled by the litigation team?"[24] Handwritten notes next to this question state: "Litigation to analyze."[25]

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[19] Brotherson Declaration at ¶ 7; Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Dockets 02-148 and 02-189, at 2 (filed Aug. 20, 2002) ("Qwest August 20 Letter").

[20] Brotherson Declaration at ¶ 9.

[21] These drafts of the minutes were provided to the Commission in response to a letter of inquiry from the Enforcement Bureau. *See* Letter from William H. Davenport, Deputy Division Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Sharon J. Devine, Qwest Communications International, Inc., dated June 26, 2003 ("LOI"). The LOI response contained a letter from Sharon J. Devine, Qwest Communications International, Inc. to William H. Davenport, Deputy Division Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated July 31, 2003 ("Qwest July 31 Letter"); a Confidentiality Request, seeking confidential treatment of the LOI response; a memorandum ("Qwest Memo"); declarations from R. Steven Davis, Todd Lundy, Dan Hult, and Larry Christensen; a lengthy privilege log; and three boxes of documents. The declarations were all properly notarized, with the exception of the Christensen declaration which was signed by the declarant two days *after* the notarization. Qwest's request for confidential treatment was denied by the Enforcement Bureau. *See Qwest Communications International, Inc.*, DA 03-3521 (Enf. Bur. rel. Nov. 4, 2003). Subsequently, Qwest narrowed the range of documents for which it claimed confidential treatment; the documents cited herein are no longer deemed confidential by Qwest. *See Qwest Communications International, Inc.* File No. EB-03-IH-0500, Application for Review in Part (filed Nov. 12, 2003).

[22] Qwest apparently recognizes this inconsistency. In Qwest's response to the Bureau's LOI, Declarant Todd Lundy states: "it is Qwest's understanding that agreements relating to operator services and directory assistance do not have to be filed." Lundy Declaration at 14. Nevertheless, Lundy continues, the "Wholesale Contract Review Committee out of an abundance of caution has directed the filing of these types of operator services and directory assistance agreements executed since the committee's formation in June of 2002." *Id. See also* Qwest Wholesale Agreement Review Committee Settlement Tracking Sheet, which provides that agreements for directory assistance list information should be filed. Documents Q-CONF-000933, 000936, 000939, 000942, 000948, 000954, 000960, 000966. Several of the unfiled Arizona agreements were for directory assistance.

[23] Document Q-CONF-003506.

[24] *Id.*

[25] Document Q-CONF-000909.

A subsequent draft of the meeting minutes deletes these references to the "litigation team."[26]

9. On August 20, 2002, as the Commission considered Qwest's applications for section 271 approval for nine of its fourteen in-region states, [27] Qwest informed us of its May 2002 letters to the state commissions.[28] Qwest indicated that pursuant to its May 2002 policy, it would file all new agreements that include provisions creating on-going obligations that relate to Section 251(b) or (c).[29] Qwest did not, however, commit to file all such prior unfiled agreements for all states.[30]

10. Soon thereafter, in late September 2002, the Qwest Wholesale Agreement Review Committee provided Qwest employees with a "Training Outline for CLEC Agreements."[31] Qwest told its employees that "[s]ection 252(a) of the Telecommunications Act requires that all agreements with CLECs in Qwest's fourteen state region relating to 'interconnection, services or network elements' shall be filed with the state commissions for approval under Section 252(e)."[32] The outline also gave nearly two dozen examples "of the types of agreements with CLECs in Qwest's fourteen-state region that need to be filed," including "services that are also reflected in the SGATs [Statements of Generally Acceptable Terms]."[33]

11. On October 4, 2002, we ruled on Qwest's petition for a declaratory ruling.[34] As noted above, notwithstanding its more recent statements, Qwest had argued in its petition that section 252(a)(1) required filing and state approval only for a "schedule of itemized charges" and

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[26] Document Q-CONF-004082.

[27] On September 10, 2002, Qwest withdrew its Qwest I and Qwest II pending section 271 applications. Ten days later, Qwest filed a single application with the Commission for authorization to provide in-region, interLATA service in all of the nine states covered in the previous section 271 applications. The Commission granted Qwest's nine-state 271 application on December 23, 2002. *See Qwest 9-State 271 Order*, 17 FCC Rcd 26303.

[28] Qwest August 20 Letter at 2. *See supra* n.18 (describing the letters).

[29] Qwest August 20 Letter at 2.

[30] *Id.* at 1-4. Qwest stated that it would file agreements with CLECs for approval by state commissions in the Qwest II states to supplement the plan announced in its reply comments in the Qwest I proceeding, WC Docket No. 02-148. *Id.* at 1.

[31] Documents Q-CONF-002147 through Q-CONF-002149.

[32] Document Q-CONF-002148.

[33] *Id.* An SGAT contains interconnection terms and conditions available to CLECs operating in that state. *See* 47 U.S.C. § 252(f)(1). The submission or approval of an SGAT does not relieve a BOC of its duty to negotiate the terms and conditions of an agreement under section 251. 47 U.S.C. § 252(f)(5).

[34] *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, Memorandum Opinion and Order, 17 FCC Rcd 19337 (2002) ("*Declaratory Ruling*").

related service descriptions.[35] We rejected this "cramped reading" of section 252, noting that "on its face, section 252(a)(1) does not further limit the types of agreements that carriers must submit to state commissions."[36] Instead, we broadly construed section 252's use of the term "interconnection agreement," holding that carriers must file with state commissions for review and approval under section 252 any "agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation . . . ."[37]

12. Shortly after release of the *Declaratory Ruling*, on November 1, 2002, the Minnesota Commission adopted in full a recommended decision by a Minnesota administrative law judge ("ALJ") that Qwest had committed 26 individual violations of the Act and Minnesota statutes by failing to file 26 distinct provisions found in twelve separate agreements with CLECs for interconnection, access to unbundled network elements ("UNEs") and/or access to services.[38] After Qwest rejected a proposal for paying restitution to CLECs for the damage caused by the secret deals, the Minnesota Commission ordered Qwest to pay a $26 million fine and undertake various compliance measures, including retroactive discounts to competitors.[39] Qwest subsequently filed a complaint in federal district court challenging the Minnesota Commission's authority to impose such a penalty.[40]

13. On December 23, 2002, we released the *Qwest 9-State 271 Order*, granting Qwest's section 271 applications for in-region interLATA service in nine of its fourteen in-region states.[41] We discussed the various state investigations, including the Minnesota

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35 Qwest Petition at 6.

36 *Declaratory Ruling*, 17 FCC Rcd at 19340-41, ¶ 8.

37 *Id.* (emphasis omitted).

38 *See* Order Adopting ALJ's Report and Establishing Comment Period Regarding Remedies, Minn. Docket No. P-421/C-02-197 (Nov. 1, 2002). Among other things, the ALJ found five different public interest implications arising from the unfiled agreements: (1) Qwest's attempt to subvert the "pick and choose" provisions of the Act; (2) Qwest's attempt to prohibit CLECs from participating in section 271 proceedings; (3) Qwest's attempt to prohibit CLECs from participating in the Qwest/US West merger proceeding; (4) Qwest's attempt to prevent disclosure of negative performance information in the section 271 proceeding; and (5) Qwest's attempt to have a CLEC become an advocate for Qwest in various proceedings, at Qwest's request. *See* Findings of Fact, Conclusions, Recommendation and Memorandum, Minn. Docket No. P-421/C-02-197 (Sept. 20, 2002) at 48.

39 On February 28, 2003, the Minnesota Commission issued an Order Assessing Penalties, Minnesota Docket No. P-421/C-02-197 (Feb. 28, 2003). After considering petitions for reconsideration, the Minnesota Commission issued, on its own motion, modifications to the February 28, 2003 Penalties Order. *See* Order after Reconsideration on Own Motion, Minn. Docket No. P-421/C-02-197 (Apr. 30, 2003).

40 *See Qwest Corporation v. Minnesota Public Utilities Commission, et at., Complaint for Declaratory Judgment and Injunctive Relief to Prevent Enforcement of Public Utilities Commission Orders*, Civ. File No. 03-3476, D. MN. (filed June 19, 2003).

41 *See Qwest 9-State 271 Order*, 17 FCC Rcd 26303.

proceeding, and expressed concern about Qwest's failure to file its agreements with the states.[42] Qwest assured us, however, that "in August 2002 Qwest filed with utility commissions in the application states all previously-unfiled contracts with CLECs that contained currently-effective going forward terms related to section 251(b) or (c) matters."[43] Based on the record in that proceeding, we concluded that Qwest had filed all of its interconnection agreements with the relevant state commissions at issue in the proceeding, with one exception: an Internetwork Calling Name Delivery Service Agreement ("ICNAM")[44] with Allegiance.[45] We rejected Qwest's claim that, because the terms were available through Qwest's SGATs, it did not have to file this agreement in Colorado and Washington.[46] We held that the ICNAM agreement "does not appear on its face to fall within the scope of the filing requirement exceptions set forth in the Commission's declaratory ruling, and accordingly, it likely should have been filed with the states."[47] While we ultimately determined that Qwest's failure to file this agreement did not affect its section 271 application, we also noted that "failure to file this agreement ... could subject Qwest to federal and/or state enforcement action...."[48]

14. Following the release of the *Qwest 9-State 271 Order*, Qwest filed ICNAM contracts in New Mexico on January 9 and January 10, 2003;[49] in Oregon on January 9, 2003;[50]

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[42] *See id.* at 26553-77, ¶¶ 453-486.

[43] Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314, at 1 (filed Dec. 13, 2002) ("Qwest December 13 Letter").

[44] Calling Name Delivery ("CNAM") allows a subscriber to receive the calling party name information and date and time of the call on a specialized display device before the call is answered. The calling party name is retrieved from a database accessible by the terminating central office switch, using non-call-associated signaling. *See* Telcordia Notes on the Networks, Network Architecture and Services, SR-2275, Issue 4, § 14.3 "CLASS Features" (Oct. 2000).

[45] *See Qwest 9-State 271 Order*, 17 FCC Rcd at 26571-72, ¶ 478 n.1746. In the nine-state proceeding, AT&T alleged that twelve unfiled agreements should have been filed under section 252. *Id.* After reviewing the agreements, we concluded that all but the ICNAM agreement had been filed, terminated, superseded, or were not related to the duties imposed under section 251 of the Act. *Id.*

[46] *Id.* The *Declaratory Ruling* does not create such an exception, but provides that any "agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1)." *Declaratory Ruling*, 17 FCC Rcd at 19340-41, ¶ 8 (emphasis omitted).

[47] *See Qwest 9-State 271 Order*, 17 FCC Rcd at 26571-72, ¶ 478 n.1746. This was also reiterated in the *Qwest 3-State 271 Order*, 18 FCC Rcd at 7397, ¶ 126.

[48] *Qwest 9-State 271 Order*, 17 FCC Rcd at 26571-72, ¶ 478 n.1746.

[49] These three agreements were approved by the New Mexico Commission, as were four of the five agreements filed by Qwest on September 9, 2002. *See Qwest 3-State 271 Order*, 18 FCC Rcd at 7398-99, ¶ 129.

[50] The Oregon Commission approved the three agreements filed on January 9, 2003, as well as sixteen agreements filed on September 4, 2002. *See id.*, 18 FCC Rcd at 7399, ¶ 130.

and in South Dakota on January 13, 2003.[51] On January 14, 2003, Qwest filed a section 271 application with the Commission for authorization to provide in-region, interLATA service in the states of New Mexico, Oregon, and South Dakota.[52]

15. On March 25-26, 2003, more than four months after the *Declaratory Ruling*, Qwest sought the Minnesota Commission's section 252 approval for 34 previously unfiled agreements, including four agreements that had been the subject of the Minnesota enforcement proceedings.[53] On March 28, 2003, Qwest filed a section 271 application with the Commission for authorization to provide in-region interLATA service in Minnesota.[54] The Minnesota Commission subsequently found all 34 agreements, in whole or in part, constituted "interconnection agreements" under section 252.[55]

16. As noted above, the state of Arizona also investigated the Qwest unfiled agreements issue.[56] On May 23, 2003, more than seven months after the *Declaratory Ruling*, Qwest filed twelve previously unfiled Arizona interconnection agreements with the Arizona Commission. In the cover letter accompanying each agreement, Qwest's counsel stated that the agreements reflected form, standard provisions that were available to CLECs on Qwest's website and SGATs and "very well may not be agreements subject to the filing requirement under the

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[51] The South Dakota Commission approved the eight agreements filed on January 13, 2003, as well as the four agreements filed on September 24, 2002. *See id.*, 18 FCC Rcd at 7399-400, ¶ 131.

[52] The three-state application was granted on April 15, 2003.

[53] Letter from Melissa E. Newman, Vice President Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-90, at 1 (filed May 23, 2003) (including a summary of the agreements).

[54] The Minnesota 271 application was granted on June 26, 2003. *See Application by Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Services in Minnesota,* WC Docket No. 03-90, Memorandum Opinion and Order, 18 FCC Rcd 13323 (2003) ("*Qwest Minnesota 271 Order*"). We note that the Minnesota commissioners did not reach a consensus on whether the Commission should approve Qwest's application. The Chair recommended approval; however, the remaining three voting commissioners recommended denial. *See* Minnesota Comments in WC Docket No. 03-90 at 18.

[55] On June 12, 2003, the Minnesota Commission approved thirteen of the agreements and approved in part and rejected in part the other 21 previously unfiled agreements. *See* Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-90 (filed June 20, 2003).

[56] Qwest and the Arizona Commission staff proposed to settle the Arizona investigation. Under the terms of the consent decree, which also included other matters, Qwest agreed to make a total of more than $20 million in payments and CLEC credits. We note that this consent decree remains under review by the Arizona Commission. We further note that the reviewing ALJ recommended denial because the settlement was too lenient. *See In re Qwest Corporation's Compliance with Section 252(e) of the Telecommunications Act of 1996*, Arizona Corporation Commission Docket No. RT-00000F-02-0271; *In re US West Communications, Inc.'s Compliance with Section 271 of the Communications Act of 1996*, Arizona Corporation Commission Docket No. T-00000A-97-0238; *Arizona Corporation Commission v. Qwest Corporation*, Arizona Corporation Commission Docket No. T01051B-02-0871, Opinion and Order (filed Dec. 2, 2003).

FCC's October 4, 2002 [*Declaratory Ruling*] Order; however, the FCC's subsequent order granting 271 relief to Qwest's 9-state application suggested the contrary."[57] On September 4, 2003, Qwest filed a section 271 application with the Commission for authorization to provide in-region interLATA service in the state of Arizona.[58]

17. While the Arizona Commission investigation was still ongoing, we granted Qwest's 271 application for Minnesota. In the *Qwest Minnesota 271 Order*, we did not decide whether Qwest had violated section 252(a) by delaying its filing of interconnection agreements with the Minnesota Commission. Nevertheless, we expressed grave concerns with Qwest's conduct:

> At the same time, we are seriously troubled by Qwest's decision to delay filing 34 agreements with the Minnesota Commission until March 25-26, 2003, and refer this matter to the Enforcement Bureau for investigation and appropriate enforcement action. The Commission clarified the incumbent LECs' obligation to file interconnection agreements under section 252(a)(1) in a Declaratory Ruling on October 4, 2002, nearly six months before Qwest filed the Minnesota agreements. We note that Qwest has provided no explanation in the record for this delay in filing the interconnection agreements. Given that it had adequate notice of its legal obligations under section 252(a), we intend to review with careful scrutiny any explanation that Qwest may provide in the context of a potential enforcement action.[59]

That same day, the Enforcement Bureau issued an LOI to Qwest regarding the unfiled agreements issue.[60] Shortly thereafter, Qwest filed 53 additional agreements dating back to 1996 in six of its in-region states.[61] Qwest responded to the LOI on July 31, 2003.

III. DISCUSSION

A. Qwest Apparently Willfully and Repeatedly Failed to File Its Interconnection Agreements in Minnesota and Arizona

18. Under section 503(b)(1) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any

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[57] *See, e.g.*, Letter from Timothy Berg, Fennemore Craig Law Offices, to Docket Control, Arizona Corporation Commission, filed May 23, 2003 (Document Q-PUB-000436).

[58] We note that the Arizona Commission did not reach a unanimous conclusion on whether we should approve Qwest's 271 application; Qwest's application was found to be in the public interest by a vote of three to two. *See* Evaluation of the Arizona Corporation Commission in WC Docket No. 03-194 at 23.

[59] *Qwest Minnesota 271 Order*, 18 FCC Rcd at 13371, ¶ 93 (citations omitted).

[60] *See supra* n.21.

[61] *See* Lundy Declaration at 15-20. These agreements are listed in Appendix A.

rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.[62] In order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.[63] The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has willfully or repeatedly violated the Act or a Commission rule.[64] As we set forth in greater detail below, we conclude under this standard that Qwest is liable for a $9 million forfeiture for 46 apparent violations of section 252(a)(1) of the Act.

1. The Commission Has Established Clear Standards Under Section 252(a)(1) of the Act

19. The fundamental issue in this case is whether Qwest apparently willfully or repeatedly violated the Act by delaying its filing of the Minnesota and Arizona interconnection agreements. The filing requirement is in section 252(a)(1) of the Act, which states:

> Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement . . . shall be submitted to the State commission under subsection (e) of this section.[65]

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[62] 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1); *see also* 47 U.S.C. § 503(b)(1)(D) (forfeitures for violation of 14 U.S.C. § 1464). Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history to section 312(f)(1) of the Act indicates that this definition of willful applies to both sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the section 503(b) context. *See, e.g., Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) ("*Southern California Broadcasting*"). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. *See, e.g., Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359 (2001) ("*Callais Cablevision*") (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage). "Repeated" means that the act was committed or omitted more than once, or lasts more than one day. *Southern California Broadcasting*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision.*, 16 FCC Rcd at 1362, ¶ 9.

[63] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

[64] *See, e.g., SBC Communications, Inc., Apparent Liability for Forfeiture*, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002).

[65] 47 U.S.C. § 252(a)(1). In addition, section 252(e)(1) of the Act states:

> Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

47 U.S.C. § 252(e)(1).

20. Once submitted, if an interconnection agreement is approved by the state commission, other carriers may also adopt the terms and conditions or the rates in the agreement pursuant to section 252(i).[66] Through this mechanism, competitive carriers avoid the delay and expense of negotiating new agreements with the incumbent LEC and then awaiting state commission approval. Absent such a mechanism, "the nondiscriminatory, pro-competition purpose of section 252(i) would be defeated . . . ."[67]

21. We have historically given a broad construction to section 252(a)(1). As noted above, in the *Local Competition Order,* we found that

> requiring filing of all interconnection agreements best promotes Congress's stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable, and nondiscriminatory terms. State commissions should have the opportunity to review *all* agreements . . . to ensure that such agreements do not discriminate against third parties, and are not contrary to the public interest.[68]

In that same order, we applied this broad construction in adopting the "pick and choose" construction of section 252(i), under which CLECs may adopt parts of interconnection agreements with incumbent LECs, rather than adopting those agreements in their entirety.[69]

22. Although section 252(a)(1) is explicit in its filing requirements, the *Declaratory Ruling* provided certainty to those requirements by stating that any "agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1)."[70] We further stated:

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[66] 47 U.S.C. § 252(i). *See also* section 51.809(a) of the Commission's rules, 47 C.F.R. § 51.809(a), which provides:

> An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any individual interconnection, service, or network element only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement.

47 C.F.R. § 51.809(a).

[67] *Local Competition Order*, 11 FCC Rcd at 16141, ¶ 1321.

[68] *Id.* at 15583-84, ¶ 167 (emphasis in original).

[69] *Id.* at 16137-42, ¶¶ 1309-23.

[70] *Declaratory Ruling,* 17 FCC Rcd at 19340-41, ¶ 8 (emphasis omitted). The sentence quoted in the text is a summary of the interconnection obligations listed in section 251 of the Act. 47 U.S.C. § 251. With respect to directory assistance, listed under "dialing parity" in section 251(b)(3), we concluded earlier that LECs must provide nondiscriminatory access to local directory assistance databases at nondiscriminatory and reasonable rates. *See* (continued....)

> This interpretation, which directly flows from the language of the Act, is consistent with the pro-competitive, deregulatory framework set forth in the Act. This standard recognizes the statutory balance between the rights of competitive LECs to obtain interconnection terms pursuant to section 252(i) and removing unnecessary regulatory impairments to commercial relations between incumbent and competitive LECs . . . . Indeed, on its face, section 252(a)(1) does not further limit the types of agreements that carriers must submit to state commissions.[71]

23. The *Declaratory Ruling* noted some reasonable but narrow exceptions to the general rule that any agreement relating to the duties outlined in sections 251(b) and (c) falls within section 252(a)'s filing requirement. Such exceptions, however, flow from the general standard of ongoing obligations. Specifically, we found that agreements addressing dispute resolution and escalation provisions relating to the obligations set forth in sections 251(b) and (c) do not have to be filed if the information is generally available to carriers.[72] We stated that settlement agreements that simply provide for backward-looking consideration that do not affect an incumbent LEC's ongoing obligations relating to section 251 do not need to be filed.[73] In addition, we found that forms completed by carriers to obtain service pursuant to terms and conditions of a underlying interconnection agreement do not constitute either an amendment to that agreement or a new interconnection agreement that must be filed under section 252.[74] Finally, we held that agreements with bankrupt competitors that are entered into at the direction of a bankruptcy court and that do not otherwise change the terms and conditions of the underlying interconnection agreement are not themselves interconnection agreements or amendments to interconnection agreements that must be filed under section 252(a).[75]

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Provision of Directory Listing Information under the Telecommunications Act of 1934, as amended, First Report and Order, 16 FCC Rcd 2736, 2752, ¶ 35 (2001). We also stated that "[c]arriers have an obligation to provide nondiscriminatory access to that data, and that, to carry out that obligation, section 252 creates a mechanism for public disclosure of the rates, terms, and conditions contained in interconnection agreements. Carriers and competitive [directory assistance] providers should then be able to opt into those rates and terms. Thus, in order to make this nondiscrimination requirement meaningful, we would expect carriers to comply with section 252 and make rates, terms, and conditions data available to requesting parties in a timely manner." *Id.* at 2752, ¶ 36.

[71] *Declaratory Ruling*, 17 FCC Rcd at 19340-41, ¶ 8.

[72] *Id.* at 19341, ¶ 9.

[73] *Id.* at 19342-43, ¶ 12.

[74] *Id.* at 19343, ¶ 13.

[75] *Id.* at 19343, ¶ 14. In addition, we recently held that to the extent that the *Declaratory Ruling* requires an agreement pertaining solely to wireline-to-wireless porting to be filed as an interconnection agreement with a state commission pursuant to sections 251 and 252 of the Act, we forbear from those requirements. *See Telephone Number Portability, CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, CC Docket No. 95-116, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 23697, 23711-12, ¶¶ 35-37 (2003).

24. As discussed above, we again dealt with the filing requirements of section 252(a)(1) in the *Qwest 9-State 271 Order.* There we referred to the *Declaratory Ruling* in concluding that all but one of the twelve agreements brought to our attention "need not be filed with state commissions under the standards enunciated in the Commission's declaratory ruling."[76] With regard to that one agreement, we stated that Qwest likely should have filed an ICNAM agreement, even though Qwest claimed that the *Declaratory Ruling* did not require that filing because the agreement was a "form agreement" the terms of which were available through SGATs in two states.[77] We reiterated this finding in the *Qwest 3-State Order.*[78]

2. Qwest Withheld Interconnection Agreements from the Minnesota and Arizona Commissions in Apparent Willful and Repeated Violation of Section 252(a)(1)

25. By January 14, 2003, when Qwest filed its three-state application with the Commission, Qwest had filed previously unfiled agreements in twelve of the fourteen states in its region either pursuant to state commission order, in accordance with the Qwest August 20 Letter in which Qwest announced that it would file "all such agreements that include provisions creating on-going obligations that relate to Section 251(b) or (c) which have not been terminated or superseded by agreement, commission order, or otherwise" or following the Commission's rulings regarding unfiled agreements in the *Declaratory Ruling* and the *Qwest 9-State 271 Order.*[79] Despite Qwest's pronouncements that it was complying with section 252 with respect to new agreements, Qwest did not file the unfiled Minnesota and Arizona agreements until several months later, filing 34 agreements with the Minnesota Commission on March 25 and 26, 2003 and filing twelve agreements with the Arizona Commission on May 23, 2003.[80]

26. Qwest executed the Minnesota agreements with various CLECs between 1997 and 2002.[81] The Minnesota Commission approved all 34 agreements, in whole or in part, pursuant to

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[76] *Qwest 9-State 271 Order,* 17 FCC Rcd at 26571-72, ¶ 478 n.1746.

[77] *Id.*

[78] *See Qwest 3-State 271 Order,* 18 FCC Rcd at 7397, ¶ 126.

[79] In addition, Qwest filed 53 unfiled agreements after receipt of the LOI. *See supra* n.61.

[80] On September 4, 2003, Qwest filed an application for authorization to provide in-region, interLATA service in the state of Arizona.

[81] The Minnesota agreements filed on March 25 and 26, 2003, consist of the following: June 9, 2000 ICNAM agreement with Allegiance; December 27, 2001 Facility Decommissioning Reimbursement agreement with AT&T; December 22, 1999 agreement for CMDS hosting and message distribution for co-providers (in-region with operator services) with Cady & addendum to agreement for CMDS hosting and message distribution for co-providers with Cady; November 15, 2001 Facility Decommissioning Reimbursement agreement with DSLnet Communications; March 1, 2002 settlement agreement with Eschelon; July 13, 2001 billing settlement agreement with Global Crossing; October 3, 2001 Facility Decommissioning Reimbursement agreement with Hickory Tech; January 15, 2000 Transient Interim Signaling Capability Service Agreement with IdeaOne; August 6, 1999 LIDB storage agreement with InfoTel; July 9, 1999 ICNAM agreement with InfoTel; September 29, 2000 ICNAM agreement with MainStreet; May 1, 2000 settlement agreement with McLeod; April 28, 2000 billing settlement agreement with (continued....)

section 252(e) of the Act.[82] The Arizona agreements date from 1998 to 2001.[83] As noted above, all twelve Arizona agreements were approved by operation of law pursuant to section 252(e).[84] As a general matter, many of the Minnesota and Arizona agreements are the same types of agreements that Qwest filed earlier in other states,[85] and meet the standards Qwest described to its employees in its September 2002 Training Outline for CLEC Agreements.[86] Indeed, seven of these agreements are ICNAM agreements, which we explicitly declared "likely should have been filed" in the *Qwest 9-State Order.*[87]

27. Qwest raises several arguments to support its delayed filing of the 46 agreements at issue here. As an initial matter, however, we emphasize Qwest's inconsistent approach

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McLeod; October 26, 2000 confidential agreement with McLeod; June 29, 2001 business escalation agreement with MCI; June 29, 2001 billing settlement agreement with MCI; December 27, 2001 Facility Decommissioning Reimbursement agreement with MCI; October 13, 1999 8XX Database Query Service agreement with MediaOne; October 13, 1999 ICNAM agreement with MediaOne; October 13, 1999 LIDB storage agreement with MediaOne; November 5, 1997 ICNAM agreement with OCI; October 22, 1997 agreement for CMDS hosting and in-region message distribution for alternately billed messages for co-providers (with operator services) with OCI & addendum; October 22, 1997 Physical Collocation Agreement with OCI; January 8, 2001 Transit Record Exchange Agreement to Co-Carriers (Wireline-Transit Qwest-CLEC) with Otter Tail; January 8, 2001 Transit Record Exchange Agreement to Co-Carriers (WSP-Transit Qwest-CLEC) with Otter Tail; June 1, 2000 settlement with SBC; October 5, 2001 Facility Decommissioning Reimbursement agreement with SBC; April 18, 2000 confidential stipulation for Toll Services and OSS with Small Minnesota CLECs; July 14, 1999 letter with US Link/InfoTel re/ extended area service; November 14, 2000 ICNAM agreement with Val-ed Joint Venture; January 18, 2000 Transit Record Exchange Agreement to Co-Carriers (WSP-Transit USW-CLEC) with Val-ed Joint Venture; January 18, 2000 Transit Record Exchange Agreement to Co-Carriers (Wireline-Transit USW-CLEC) with Val-ed Joint Venture; December 31, 2001 billing settlement agreement with XO. Documents Q-PUB-001087 through Q-PUB-001339.

[82] *See supra* n.55.

[83] The Arizona agreements consist of the following: March 23, 2000 ICNAM agreement with Allegiance; June 29, 2000 directory assistance agreement with Allegiance; July 12, 2001 Custom Local Area Signaling Services agreement with Adelphia; July 14, 1999 directory assistance agreement with Frontier; July 14, 1999 operator services agreement with Frontier; March 14, 2001 operator services agreement with Ionex; March 14, 2001 directory assistance agreement with Ionex; April 20, 2001 LIDB storage agreement with Adelphia; October 4, 1999 operator services agreement with OnePoint; October 4, 1999 directory assistance agreement with OnePoint; December 16, 1998 Transient Interim Signaling Capability Service Agreement with US West Wireless; and February 26, 1999 operator services agreement with Winstar Wireless. Documents Q-PUB-000318 through Q-PUB-000447.

[84] *See Application by Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Services in Arizona*, WC Docket No. 03-194, Memorandum Opinion and Order, 18 FCC Rcd 25504, 25534, ¶ 55 n.205 (2003); Qwest Memo at 13. *See also* Qwest Application, WC Docket No. 03-194, at 124 (explaining that these agreements "have been approved by the Arizona Commission by operation of law.")

[85] *See* Lundy Declaration at 6-11, listing the states in which the terms of 32 of the Minnesota unfiled agreements were also available.

[86] *See, e.g.*, Qwest "Training Outline for CLEC Agreements." Documents Q-CONF-002147 through Q-CONF-002149.

[87] *See Qwest 9-State 271 Order*, 17 FCC Rcd at 26571-72, ¶ 478 n.1746; *Qwest 3-State 271 Order*, 18 FCC Rcd at 7397, ¶ 126.

towards the filing of its interconnection agreements – an inconsistency that underscores the egregious nature of Qwest's actions at issue here. While Qwest argues that the Minnesota and Arizona agreements are not interconnection agreements subject to the requirements of section 252(a)(1), the carrier's documents indicate that Qwest has taken a different approach towards the same or similar types of previously unfiled interconnection agreements in the states for which it was seeking section 271 approval and for new agreements.

28. As discussed above, as early as May 2002, Qwest claimed a policy of "broadly filing all contracts, agreements, or letters of understanding between Qwest Corporation and CLECs that create obligations to meet the requirements of Section 251(b) or (c) on a going forward basis."[88] On August 21 and August 22, 2002, Qwest submitted previously unfiled agreements with the state commissions in all nine states for which it was seeking section 271 approval at the time.[89] Accordingly, with respect to selected states, *i.e.*, those with section 271 applications pending before this Commission, Qwest claimed to have identified and submitted all its previously unfiled agreements in August 2002. In addition, following the release of the *Qwest 9-State 271 Order*, Qwest filed ICNAM contracts in New Mexico on January 9 and January 10, 2003;[90] in Oregon on January 9, 2003;[91] and in South Dakota on January 13, 2003.[92] Shortly thereafter, on January 14, 2003, Qwest filed a section 271 application with the Commission for authorization to provide in-region, interLATA service in those three states.[93] Qwest's treatment of interconnection agreements depended on when the agreement was executed, and for the pre-May 2002 agreements, on whether a section 271 application was imminent. Because Qwest only

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[88] Qwest August 20 Letter at 2.

[89] Qwest August 20 Letter. In Iowa, Qwest filed its previously unfiled agreements on July 29, 2002, pursuant to an order from the Iowa Board. The Colorado Commission reviewed sixteen agreements, found that all sixteen met the definition of interconnection agreements, and approved two of the sixteen agreements, and rejected twelve due to provisions that "violate the public policy" and two as incomplete. *See Qwest 9-State 271 Order*, 17 FCC Rcd at 26559-60, ¶ 461. The Idaho Commission approved all seven agreements. *See id.* at 26560-61, ¶ 463. The Iowa Board concluded, in its own investigation of Qwest's unfiled agreements, that Qwest had violated section 252, as well as a state rule, by failing to file the agreements with the Board. *See id.* at 26561-62, ¶ 464-65. Pursuant to the Iowa Board's order, Qwest filed fourteen agreements, which were subsequently approved. *Id.*. The Montana Commission approved four agreements and denied three agreements. *See id.* at 26563, ¶ 466. The Nebraska Commission approved the ten agreements that Qwest filed. *See id.* at 26563-64, ¶ 467. North Dakota approved the three agreements Qwest filed. *Id.* at 26564, ¶ 468. The Utah Commission approved the eleven agreements Qwest filed, by operation of law. *Id.* at 26564, ¶ 469. The Washington Commission approved the sixteen agreements Qwest filed. *Id.* at 26565, ¶ 470. The Wyoming Commission approved the four agreements Qwest filed. *Id.* at 26566, ¶ 471.

[90] These three agreements were approved by the New Mexico Commission, as were four of the five agreements filed by Qwest on September 9, 2002. *See Qwest 3-State 271 Order,* 18 FCC Rcd at 7398-99, ¶ 129.

[91] The Oregon Commission approved the three agreements filed on January 9, 2003, as well as sixteen agreements filed on September 4, 2002. *See id.,* 18 FCC Rcd at 7399, ¶ 130.

[92] The South Dakota Commission approved the eight agreements filed on January 13, 2003, as well as the four agreements filed on September 24, 2002. *See id.,* 18 FCC Rcd at 7399-400, ¶ 131.

[93] We granted the three-state application on April 15, 2003.

filed the previously unfiled agreements as the date approached for its section 271 applications in a particular state, we believe these filings were not made "out of an abundance of caution," as Qwest suggests. With respect to Minnesota and Arizona, Qwest took no action to file its pre-existing unfiled agreements until it was preparing to file its section 271 application with this Commission.

29. Citing the *Declaratory Ruling*, Qwest argues that many of the Minnesota and Arizona agreements at issue here are "form" agreements for ordering services available through its SGATs, and as such did not warrant filing under section 252(a).[94] Contrary to Qwest's assertions, however, the *Declaratory Ruling* does not contain a filing exception for form or standardized agreements. While the *Declaratory Ruling* stated that section 252(a) did not require the filing of ordering forms completed by carriers pursuant to an underlying agreement, it did not create an exception for "form" interconnection agreements. Specifically, the Commission stated that "forms completed by carriers to obtain services pursuant to terms and conditions set forth in an interconnection agreement do not constitute either an amendment to that interconnection agreement or a new interconnection agreement that must be filed under section 252(a)(1)."[95]

30. This language nowhere suggests that an interconnection agreement memorialized by way of a standardized contractual form is not required to be filed pursuant to section 252(a)(1). Indeed, we rejected this argument in the *Qwest 9-State 271 Order* with respect to an ICNAM agreement between Qwest and Allegiance. In response to CLEC criticism that the ICNAM agreement and others should have been filed under section 252(a), Qwest referred to the *Declaratory Ruling's* language exempting ordering forms from section 252(a)'s requirement.[96] In rejecting this argument, we held that Qwest "likely should have" filed the ICNAM agreement with the Colorado and Washington state commissions, despite its alleged "form" status and Qwest's allegation that its terms were available through Qwest's SGATs for those states.[97]

31. Moreover, Qwest's alleged "form interconnection agreement" exemption is the veritable exception that swallows the rule, since virtually all terms and conditions of interconnection could be reduced to such a form or standardized agreement. Additionally, any

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[94] Qwest July 31, 2003 Letter.

[95] *Declaratory Ruling*, 17 FCC Rcd at 19343, ¶ 13. *See, e.g., Core Communications, Inc. v. Verizon Maryland, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 7962, 7971, ¶ 24 (2003) (explaining that Core accepted the terms of Verizon's Maryland SGAT; Core and Verizon signed a schedule to the SGAT entitled "Request for Interconnection"; and, therefore, the Maryland SGAT served as the parties' interconnection agreement).

[96] *See* Qwest December 13 Letter at 2 & Attachment 1, at 1 (attaching matrix of agreements with explanation as to why Qwest did not file each agreement; stating with respect to the Allegiance ICNAM agreement, "[t]he FCC's Declaratory Ruling held that order and contract forms 'completed by carriers to obtain service pursuant to terms and conditions set forth in an interconnection agreement do not constitute either an amendment to that interconnection agreement or a new interconnection agreement that must be filed under section 252(a)(1)' . . . . "). Attachment 1, at 2 (quoting *Declaratory Ruling*, 17 FCC Rcd at 19343, ¶ 13).

[97] *Qwest 9-State 271 Order*, 17 FCC Rcd at 26571-73, ¶ 478 n.1746.

such "form" agreement in use by Qwest today could be revised tomorrow.[98] Unless such agreements are made available to other carriers via the process outlined in section 252, Qwest's competitors would not be able to opt into these agreements pursuant to section 252(i) because they would be unaware of the previous agreements' existence, not to mention the specific terms and conditions. The *Declaratory Ruling* ensures that the agreement terms are memorialized in a public document, subject to state approval, which permits other carriers to opt into the terms of the agreement under section 252(i). Under Qwest's interpretation, there would be no publicly available document. Furthermore, as noted above, Qwest's internal policy conflicts with this argument. Qwest's September 2002 "Training Outline for CLEC Agreements" explicitly states that "services that are also reflected in the SGATs" are among "the types of agreements with CLECs in Qwest's fourteen-state region that need to be filed."[99]

32. Qwest further contends that "the [*Declaratory*] *Ruling* states that if information on service offerings is generally available to CLECs, such as through posting on a website, agreements covering these matters need not be filed."[100] Once again, Qwest misreads our order. In rejecting Qwest's argument that "dispute resolution and escalation provisions" are *per se* outside the scope of section 252(a)(1), we held "[u]nless this information is generally available to carriers (*e.g.*, made available on an incumbent LEC's wholesale website), we find that agreements addressing dispute resolution and escalation provisions relating to the obligations set forth in sections 251(b) and (c) are appropriately deemed interconnection agreements."[101] This exception is for contact lists and procedures for escalation, posted on websites and available to all carriers. This exception does not apply to "service offerings," as Qwest contends. At no point did we create a general "web-posting exception" to section 252(a). As with Qwest's asserted "form agreement" exception to section 252(a)(1), a "web-posting exception" would render that provision meaningless, since CLECs could not rely on a website to contain all agreements on a permanent basis. Moreover, unlike the terms of an SGAT, web-posted materials are not subject to state commission review, further undermining the congressionally established mechanisms of section 252(e).[102]

33. Qwest contends that it had no legal obligation to "rush out and file any and all contracts with CLECs that might arguably be deemed interconnection agreements under the [*Declaratory*] *Ruling*."[103] Qwest takes the position that until a state commission tells Qwest that a certain agreement must be filed, Qwest has no obligation to file the agreement.[104] We

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98 *See, e.g.*, Qwest Memo at n.30 (explaining that the "form" contract for CMDS had changed in June 2003). We also note that a carrier's SGAT may change.

99 Document Q-CONF-002148.

100 Qwest July 31, 2003 Letter at 2-3.

101 *Declaratory Ruling*, 17 FCC Rcd at 19341, ¶ 9.

102 *See* 47 U.S.C. § 252(f).

103 Qwest Memo at 4.

104 Qwest Memo at 10.

emphatically disagree. The statute clearly contradicts Qwest's argument. Under section 252(a)(1), LECs must file interconnection agreements with state commissions for approval. In the *Declaratory Ruling*, the Commission clarified the types of agreements that must be filed. Any interconnection agreement filed and approved by the state commission under section 252 must be made available to any other requesting carrier upon the same terms and conditions, in accordance with section 252(i). Section 252(a)(1) does not condition filing on a state commission first telling a carrier that a certain agreement (which has not yet been seen) must be filed.

34. Nor does Qwest's argument find any support in our *Declaratory Ruling* or other orders. Qwest's reliance on the statement in the *Declaratory Ruling* that "state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed" is misplaced.[105] After an agreement is filed with a state commission, the commission may approve or reject that agreement. The state commission can advise the carrier whether a certain type of agreement is considered an interconnection agreement that requires filing in that state. [106] Until an agreement is filed, however, the state commission would not be in a position to approve, reject, or determine whether a certain type of agreement does not require filing.[107]

35. Moreover, Qwest has not even followed its asserted construction of section 252(a)(1). Qwest claims that it "appropriately deferred more formal filing of the four MN DOC contracts in that state until after the PUC at least issued its first order on remedies."[108] But Qwest did not file the Minnesota agreements until March 25 and 26, 2003. By that point, nearly five months had passed since the Minnesota Commission held that Qwest had violated section 252(a) by withholding the agreements in question,[109] and more than seven months had passed since the initial ALJ finding to the same effect. [110] We find that Qwest's timing appears to have had more to do with litigation strategy and its impending section 271 application (which it filed on March 28, 2003) than instructions from the Minnesota PUC. As noted above, Qwest internal documents refer to pre-existing unfiled interconnection agreements being handled by the "litigation team." Additionally, Qwest admits that its decision "was influenced by the fact that it was preparing to file its application for 271 authority in Minnesota," and that it had earlier followed the same

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[105] Qwest Memo at 10 (citing *Declaratory Ruling*, 17 FCC Rcd at 19341-42, ¶ 10).

[106] *Declaratory Ruling*, 17 FCC Rcd at 19341-42, ¶ 10.

[107] We also note that in the Qwest August 20 Letter, in which Qwest discussed filing the previously unfiled agreements in Colorado, Idaho, Nebraska, and North Dakota, Qwest asserted that the filings would be made to comply with the requirements of section 252. Qwest August 20 Letter at 1-2.

[108] Qwest Memo at 10.

[109] *See supra* n.38.

[110] *See* Findings of Fact, Conclusions, Recommendation and Memorandum, Minn. Docket No. P-421/C-02-197 (Sept. 20, 2002) at 52.

procedure of filing previously unfiled agreements in connection with the three-state application.[111]

36. Qwest also argues that it provided the Minnesota agreements to the Minnesota Commission in the context of the investigation.[112] According to Qwest, its provision of these agreements to the Minnesota DOC investigative staff provided adequate notice to the Minnesota Commission of these agreements. Additionally, Qwest argues, the Minnesota DOC's decision not to include all 34 agreements in its enforcement proceeding amounts to a finding that those agreements did not have to be filed under section 252. We disagree with Qwest's position. Qwest's compliance with investigative demands from the Minnesota Commission staff is irrelevant to its compliance with section 252. Section 252(e)(1) of the Act unambiguously states: "Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies."[113] Until Qwest submitted the agreements to the state commission, the agreements did not have state approval and other CLECs did not have the opportunity to adopt those agreements. Providing interconnection agreements to state commission staff in an investigation does not satisfy the requirements of section 252.

37. Moreover, we note that Qwest's argument is belied by the Minnesota DOC's finding, adopted by the Minnesota Commission, with respect to each of the late-filed agreements, that "[a]lthough this agreement was not one of the agreements that the Department chose to use as part of its complaint, this should not suggest that Commission approval of this agreement is not necessary. The agreements selected by the Department were limited for the purposes of the contested case process in Docket No. P421/IC-02-197. It is the position of the Department that Qwest has always been obligated to file this agreement."[114]

38. Regarding the Arizona agreements, Qwest again appears to concede that its litigation strategy not its construction of the Act or our orders controlled its decision to delay filing. Qwest contends that in light of the Arizona Commission investigation into the unfiled agreements the carrier "has been cautious about making filings that could be viewed as a

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[111] Qwest Memo at 12.

[112] Qwest July 31, 2003 Letter at 2. We note that Qwest provided these agreements to the Minnesota DOC, not the Minnesota Commission per se. The Minnesota DOC is an independent arm of the Minnesota Commission, charged with representing "the broad public interest in all telecommunications matters before the [Minnesota Commission]." *See* Minnesota DOC website: http://www.state.mn.us/cgi-bin/portal/mn/jsp/content.do?subchannel=-536881735&programid=536884839&sc3=null&sc2=null&id=-536881351&agency=Commerce.

[113] 47 U.S.C. § 252(e)(1).

[114] *See, e.g.*, Application for Approval of the March 26, 2003 Amendment to the Interconnection Agreement between U.S. Link, Inc. and Qwest Corporation (Originally Approved in Docket No. P-465,421/M-97-1316); Incorporating the Ability to Use Local Tandem Functionality to Transport Calls to and from Extended Area Service (EAS) Calling Areas, Minnesota Public Utilities Commission Docket No. P-465,421/IC-03-456 (Jun. 12, 2003).

concession."[115] Qwest admits that in May 2003, it was negotiating a settlement with Arizona Commission staff and preparing to file its section 271 application with this Commission; therefore, it decided to file the twelve unfiled agreements in Arizona.[116] In addition, Qwest's documents indicate that contemporaneously with filing the Arizona agreements on May 23, 2003, Qwest's counsel effectively conceded that the *Qwest 9-State 271 Order* required filing those agreements. In the cover letter attached to each of the twelve Arizona interconnection agreements filed on May 23, 2003, Qwest's counsel stated that each agreement reflects form, standard provisions that are available to CLECs through Qwest's website and the SGAT and "very well may not be agreements subject to the filing requirement under the FCC's October 4, 2002 Order; however, the FCC's subsequent order granting 271 relief to Qwest's 9-state application suggested the contrary."[117]

39. We conclude that Qwest apparently failed to comply with section 252(a)(1) of the Act regarding 34 interconnection agreements in Minnesota and twelve interconnection agreements in Arizona. Rather than promptly seeking state commission review of its agreements, as required under section 252(a)(1), Qwest apparently withheld nearly four dozen agreements to avoid the negative reaction that would accompany such a filing. Qwest apparently calculated that compliance with section 252(a)(1) only for pending application states would suffice to avoid our denial of its section 271 applications. Thus, during the nine-state application process, Qwest agreed to follow section 252 for new agreements, formed the Wholesale Contract Review Team, and filed previously unfiled agreements in the nine application states. Similarly, just before filing its three-state application, Qwest filed previously unfiled agreements in those states. Immediately prior to filing the Minnesota section 271 application, Qwest filed the previously unfiled Minnesota agreements, and as Qwest was settling with the Arizona Commission, and prior to submitting the Arizona section 271 application, Qwest filed the previously unfiled Arizona agreements. Finally, shortly after receiving the Enforcement Bureau's LOI, Qwest filed an additional 53 agreements in six states seven months after Qwest had assured us that it had filed "all previously-unfiled agreements" for those same jurisdictions.[118]

[115] Qwest Memo at 13.

[116] *Id.*

[117] *See, e.g.*, Letter from Timothy Berg, Fennemore Craig Law Offices, to Docket Control, Arizona Corporation Commission, filed May 23, 2003 (Document Q-PUB-000436).

[118] *See* Qwest December 13 Letter.

40. We find that Qwest's apparent violations were willful and repeated, as described in section 503(b) of the Act. The Commission has previously held that "willful," as used in section 503(b), means the conscious and deliberate commission or omission of any act, irrespective of any intent to violate the law.[119] Thus, even if the record did not contain ample evidence that Qwest knew that it was violating section 252(a)(1) by withholding the agreements, Qwest would be subject to a forfeiture. In addition, Qwest's actions were "repeated," as that term is used in section 503(b), since Qwest withheld more than 40 interconnection agreements from the state commissions of Arizona and Minnesota.[120]

41. The Commission's *Declaratory Ruling* and the *Qwest 9-State 271 Order* made clear our filing requirements. Qwest nevertheless apparently delayed filing the Minnesota and Arizona agreements, while at the same time filing similar unfiled agreements with the state commissions for which it had pending 271 applications before the Commission. During this time period, Qwest was also filing new agreements, in compliance with section 252(a) and the *Declaratory Ruling*. In pursuit of section 271 approval, Qwest repeatedly told this Commission that it had implemented new processes to ensure section 252 compliance with respect to new agreements in some states, but at the same time apparently intentionally withheld filing of dozens of agreements in Minnesota and Arizona. We conclude that Qwest apparently willfully and repeatedly violated section 252(a)(1) of the Act by failing to timely file 46 interconnection agreements in Minnesota and Arizona.

B. Proposed Action

42. Section 503(b)(2)(B) of the Act authorizes the Commission to assess a forfeiture of up to $120,000 for each violation or each day of a continuing violation, up to a statutory maximum of $1.2 million for a single act or failure to act.[121] In determining the appropriate forfeiture amount, we consider the factors enumerated in section 503(b)(2)(D) of the Act, including "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[122]

43. Qwest argues that it should not be subject to forfeiture for any violations of section 252(a) because "neither the Act itself, nor any FCC rule or order, sets forth with 'ascertainable certainty' any deadline by which an agreement subject to Section 252(a)(1)'s filing requirement must actually be filed with the state."[123] Qwest's reliance on the notice requirement in *Trinity Broadcasting* is misplaced. With respect to notice of a filing deadline, Qwest

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[119] *See, e.g., Southern California Broadcasting Co.*, 6 FCC Rcd at 4388.

[120] *Southern California Broadcasting,* 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision.,* 16 FCC Rcd at 1362, ¶ 9.

[121] 47 U.S.C. § 503(b)(2)(B); *see also* 47 C.F.R. § 1.80(b)(2); *see also Amendment of Section 1.80(b) of the Commission's Rules, Adjustment of Forfeiture Maxima to Reflect Inflation,* Order, 15 FCC Rcd 18221 (2000).

[122] 47 U.S.C. § 503(b)(2)(B).

[123] Qwest Memo at 4 (quoting *Trinity Broadcasting Corp. v. FCC,* 211 F.3d 618, 628 (D.C. Cir. 2000)).

overlooks the point that the filing requirement is part of the section 251 interconnection obligation, not a separate requirement with a separate deadline. Qwest, as an incumbent LEC, has certain interconnection obligations set forth in section 251.[124] Agreements to provide the services listed in section 251 must be filed with the state commission for approval.[125] Until the agreements are approved by the state commission, they are not valid interconnection agreements.[126] Executing agreements with CLECs does not fulfill Qwest's section 251 obligations until the agreements are filed and approved. Thus, Qwest cannot meet its section 251 obligations without filing and obtaining approval of interconnection agreements. For Qwest to claim that it was not required to file agreements because neither the Act nor the Commission provided a specific deadline for filing ignores the fact that filing (and approval) of agreements is a prerequisite for a valid interconnection agreement.[127] Furthermore, we note that interconnection agreements are only effective for a term, often three years. Under Qwest's logic, it could delay filing for an indefinite period of time. In fact, Qwest's failure to file agreements for the entire length of the agreement – which appears to have happened with the expired Minnesota agreements – could lead to a permanent alteration in the competitive landscape or a skewing of the market in favor of certain competitors.

44. In any event, we also find that Qwest had ample notice of the filing requirements under section 252(a)(1), but complied only selectively with these requirements. Qwest has been on notice of its potential violation of section 252(a)(1) since initiation of the Minnesota investigation into Qwest's unfiled agreements in 2001. While Qwest adopted in May 2002 a policy of filing all new interconnection agreements with CLECs, and created the Wholesale Agreement Review Committee to file new agreements,[128] Qwest did not file its unfiled agreements in Minnesota or Arizona. Qwest then sought to clarify the filing requirements of section 252 by filing the Qwest Petition; but even after release of the *Declaratory Ruling,* Qwest still failed to file the Minnesota and Arizona unfiled agreements. Subsequently, we discussed the

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[124] These obligations are, in brief: the duty to provide resale, number portability, dialing parity, access to rights-of-way; to establish reciprocal compensation; to negotiate in good faith the section 251 duties; to provide interconnection; to provide access to unbundled network elements; and to provide collocation. *See* 47 U.S.C. § 251(b) & (c).

[125] 47 U.S.C. § 251(a), (e).

[126] *See Qwest 9-State 271 Order*, 17 FCC Rcd at 26569, ¶ 475 (addressing the issue that an agreement is not an "interconnection agreement" until the state commission has made that determination).

[127] *See, e.g., AT&T Corporation Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 23398, 23402, ¶ 9 (2003) (explaining that AT&T did not comply with the requirement that it place consumers' names on the do-not-call list within a reasonable time; that AT&T's own policy of placing customers' names on the list within 30 days was the outer limit of reasonableness; and that AT&T apparently did not even meet this standard).

[128] *See* Qwest August 20 Letter at 2. The Qwest proposal is summarized at *Qwest 9-State 271 Order*, 17 FCC Rcd 26555-56, ¶ 457. Qwest's May 2002 policy also involved filing previously unfiled agreements for states that were subject to section 271 applications. *See id.* at 26569, n.1738. The fact that Qwest assured the Commission that it had filed or was filing previously unfiled interconnection agreements in application states does not justify its failure to file previously unfiled interconnection agreements in other states.

unfiled agreements issue in the *Qwest 9-State 271 Order,* in which we held that Qwest "likely should have filed" an ICNAM agreement even though the terms were available through Qwest's SGATs for the relevant jurisdictions, and that "failure to file this agreement ... could subject Qwest to federal and/or state enforcement action...."[129] Qwest apparently took the Commission's instructions in the *Qwest 9-State 271 Order* seriously, but only with respect to the three states for which it intended to file 271 applications in the near future.[130]

45. Qwest did not file the 34 Minnesota agreements until March 25 and 26, 2003, more than three months after release of the *Qwest 9-State 271 Order*, more than five months after release of the *Declaratory Ruling*, and more than ten months after implementing its May 2002 policy of filing unfiled agreements. Qwest's conduct is more egregious with respect to the twelve Arizona agreements, which it did not file until May 23, 2003. Even if we assume that Qwest did not realize that the Minnesota and Arizona agreements should have been filed when the contracts were executed, by any reasonable measure Qwest should have filed those agreements shortly after October 4, 2002, under the guidance of the *Declaratory Ruling* and in keeping with its own internal policy of section 252(a) compliance, initiated in May 2002. As we held in the *SBC Michigan 271 Order,* "incumbent LECs have had adequate notice of their legal obligations under section 252(a)" since the *Declaratory Ruling.*[131]

46. As discussed above, these apparent violations merit a substantial forfeiture. In the *SBC Michigan 271 Order*, we noted that "if such proceedings find that this or other agreements should have been filed ... under section 252(a)(1), we would consider any filing delays to be extremely serious."[132] Section 252(a)(1) is not just a filing requirement. Compliance with section 252(a)(1) is the first and strongest protection under the Act against discrimination by the incumbent LEC against its competitors.

47. Indeed, the Minnesota Commission found that Qwest had discriminated against CLECs by failing to file interconnection agreements:

> In each of the twelve interconnection agreements cited by the Minnesota Department of Commerce, Qwest provided terms, condition, or rates to certain CLECs that were better than the terms, rates, and conditions that it made available to the other CLECs and, in fact, it kept those better terms, conditions, and rates a secret from the other CLECs. In so doing, Qwest unquestionably treated those select CLECs better than the other CLECs. In short, Qwest knowingly and

[129] *Id.* at 26571-72, ¶ 478 n.1746.

[130] *See supra* para. 14.

[131] *SBC Michigan 271 Order*, 18 FCC Rcd at 19122-23, ¶ 180.

[132] *Id.*

intentionally discriminated against the other CLECs in violation of Section 251.[133]

Similarly, the Arizona Commission's proposed settlement with Qwest also reflects allegations that Qwest discriminated against CLECs by failing to file its interconnection agreements.[134] Although we do not determine here whether Qwest engaged in unlawful discrimination with respect to the 46 agreements at issue in this proceeding, the potential for such discrimination underlies our concerns regarding Qwest's apparent violations of section 252(a)(1).[135] Even if no such discrimination took place, Qwest may not ignore the requirements of the Act and our repeated instructions regarding section 252(a)(1).

48. Qwest ignored the potential for discrimination and competitive harm by withholding the agreements at issue here. Qwest concedes that it delayed filing the interconnection agreements at issue primarily because it wished to minimize any damage to its positions in state or federal regulatory proceedings. Qwest admits that its decision to file its agreements in Minnesota "was influenced by the fact that it was preparing to file its application for 271 authority in Minnesota."[136] Similarly, Qwest admits that it "decided in May to proceed with filing of the 12 form contracts before the ACC [Arizona Corporation Commission]. By May, Qwest was less concerned that such a filing might be treated as an admission of liability and result in material penalties."[137]

49. As noted above, pursuant to section 503(b)(2)(B), we may propose a forfeiture against a common carrier of no more than $120,000 per violation or per day of a continuing violation, up to a maximum of $1.2 million. In the Minnesota proceeding, after the state assessed a $26 million penalty against Qwest, the carrier delayed filing until several days before submitting its application for section 271 authority with this Commission. Similarly, the Minnesota penalty did not convince Qwest to file the Arizona agreements. Rather, Qwest took nearly three months to file the Arizona agreements, and did so not to comply with the law, but because it no longer feared that such a filing would compromise its litigation posture in the Arizona enforcement proceeding. Moreover, despite the Minnesota fine and the Arizona

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[133] Order Adopting ALJ's Report and Establishing Comment Period Regarding Remedies, Minnesota Docket No. P-421/C-02-197, at 5 (Nov. 1, 2002).

[134] Specifically, the proposed settlement agreement contains an allegation that "Qwest violated section 252(e) of the Telecommunications Act by failing to file for Commission review and approval certain agreements with Competitive Local Exchange Carriers ("CLECs") operating in the state of Arizona" and an allegation that "Qwest improperly entered into settlement agreements with CLECs that resulted in nonparticipation by such CLECs in the Commission docket evaluating Qwest's application under Section 271 of the Telecommunications Act ...." *See* July 25, 2003 Settlement Agreement between Qwest Corporation and Arizona Corporation Commission. We note that this settlement has not been approved by the Arizona Commission. *See supra* n.56.

[135] *See SBC Communications, Inc. Apparent Liability for Forfeiture*, Forfeiture Order, 17 FCC Rcd 19923, 19935, ¶ 24 (2002) (assessing a significant penalty due to the potential competitive impact of SBC's violations).

[136] Qwest Memo at 12.

[137] Qwest Memo at 13.

proposed settlement on the unfiled agreements at issue and having advised us that all unfiled agreements had been filed in the states covered by the nine and three-state section 271 applications, Qwest only recently filed an additional 53 agreements in six of those states. In order to deter future violations of this and other important market-opening obligations under the 1996 Act, we believe a substantial penalty is warranted.

50. Qwest delayed filing 46 agreements with the Arizona and Minnesota Commissions, in apparent violation of section 252(a)(1). Even if we assume that Qwest did not have clear notice of its obligations under section 252(a)(1) until release of the *Declaratory Ruling*, Qwest delayed filing the Minnesota and Arizona agreements for at least an additional five and seven months, respectively. Thus, Qwest's apparent violations of section 252(a)(1) are continuing violations,[138] and we could potentially subject the carrier to a penalty of $1.2 million per agreement, for a total proposed forfeiture of $55.2 million. We find, however, that the maximum penalty for each unfiled agreement would be excessive under the circumstances.[139] Therefore, based on the circumstances of this case, including pending penalties at the state commissions, we exercise our discretion to propose a total forfeiture of $9 million for Qwest's 46 apparent violations of section 252(a)(1).

51. The Commission has made clear that it will take into account a violator's ability to pay in determining the amount of a forfeiture so that forfeitures against "large or highly profitable entities are not considered merely an affordable cost of doing business."[140] In second quarter 2003, Qwest Communications International, Inc. (the parent company of Qwest Corporation) had total operating revenues of $3.601 billion.[141] For a company of this size, a $9 million forfeiture is not excessive. Indeed, a smaller forfeiture would lack adequate deterrent effect.

52. Therefore, based on the above discussion and pursuant to section 503(b)(2) of the Act and our rules, we find that Qwest is apparently liable for each of its 46 apparent violations of section 252(a)(1) of the Act, for a total proposed forfeiture of $9 million.

IV. ORDERING CLAUSES

53. ACCORDINGLY, IT IS ORDERED THAT, pursuant to section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and section 1.80 of the

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[138] Our action today covers the twelve-month period prior to the release data of this NAL.

[139] *See Verizon Telephone Companies, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 18796, 18803, ¶ 17 (2003) (explaining that we would not propose the maximum possible forfeiture because that would result in an excessive amount under the circumstances).

[140] *See Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17099-100, ¶ 24 (1997); *recon. denied*, 15 FCC Rcd 303 (1999).

[141] *See* "Qwest Communications Reports Second Quarter 2003 Net Loss Per Share of $0.05; Financial Statements Essentially Complete," Press Release, Sept. 3, 2003.

Commission's rules, 47 C.F.R. § 1.80, that Qwest Corporation is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of $9 million for willfully and repeatedly violating the Act and the Commission's rules.

54. IT IS FURTHER ORDERED THAT, pursuant to section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, within thirty days of the release date of this NOTICE OF APPARENT LIABILITY, Qwest Corporation SHALL PAY the full amount of the proposed forfeiture currently outstanding on that date or shall file a written statement seeking reduction or cancellation of the proposed forfeiture.

55. Payment of the forfeiture may be made by check or similar instrument, payable to the order of the Federal Communications Commission. Such remittance should be made to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the NAL/Acct. No. referenced above and FRN No. 0001-6056-25.

56. The response, if any, to this NOTICE OF APPARENT LIABILITY must be mailed to William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554 and must include the NAL/Acct. No. referenced above.

57. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

58. Requests for payment of the full amount of this NAL under an installment plan should be sent to Chief, Credit and Management Center, 445 12th Street, S.W., Washington, D.C. 20554.[142]

59. Under the Small Business Paperwork Relief Act of 2002, Pub.L.No. 107-198, 116 Stat. 729 (June 28, 2002), the Commission is engaged in a two-year tracking process regarding the size of entities involved in forfeitures. If you qualify as a small entity and if you wish to be treated as a small entity for tracking purposes, please so certify to us within 30 days of this NAL, either in your response to the NAL or in a separate filing to be sent to the Investigations and Hearings Division, Enforcement Bureau, 445 12th Street, S.W., Washington, D.C. 20054. Your certification should indicate whether you, including your parent entity and its subsidiaries, meet one of the definitions set forth in the list in Appendix B of this NAL. This information will be used for tracking purposes only. Your response or failure to respond to this question will have no effect on your rights and responsibilities pursuant to section 503(b) of the Communications

[142] *See* 47 C.F.R. § 1.1914.

Act. If you have any questions regarding any of the information contained in Appendix B, please contact the Commission's Office of Communications Business Opportunities at (202) 418-0990.

60. IT IS FURTHER ORDERED that a copy of this NOTICE OF APPARENT LIABILITY AND ORDER shall be sent by certified mail, return receipt requested, to Qwest, 607 14th Street NW, Suite 950, Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

1801 California Street, 21st Floor
Denver, CO 80202

303.896.5335 fax

CONFIDENTIAL

Qwest

November 15, 2000

VIA ELECTRONIC AND U.S. MAIL

Mail

Richard A. Smith
President & COO
Eschelon Telecom, Inc.
730 2nd Avenue South, Suite 1200
Minneapolis, MN 55402

Dear Rick:

Attached is a copy of the features listed in the email I received yesterday from Bob Pickens. The attached features matrix includes the corresponding USOCs and pricing, where pricing has been filed and approved. We have been unable to locate a feature or USOC for "Permanent Line Blocking." You may be referring to Dial Lock, which is an AIN feature. If so, we will address that and any other AIN features of interest to Eschelon as part of the Implementation Plan and the quarterly meetings.

As indicated, to date, rates have not yet been established for all of the features. Until rates are filed and approved, features available with platform orders will be included in the flat based rate. After rates are filed and approved for such features, the established rate will apply to any features not listed in Attachment 3.2 to the Interconnection Agreement as being part of the flat rate. Additionally, Voice Messaging service, DSL service, Directory Assistance, and additional Listing service, will be billed at 100% retail rates when ordered with the platform.

If you have any questions please contact me.

Sincerely,

Freddi Pennington

Freddi Pennington
Resale/UNE-P/PAL Group Manager
(303) 896-1049

Attachments: As stated

Cc: Arturo Ibarra, Laurie Korneffel, Audrey McKenney, Judy Rixe – Qwest
Jeff Oxley - Eschelon

Utilities Division Staff v. Eschelon
Telecom of Arizona, Inc.
Docket No. T-03406A-03-0888
Exhibit 3

Eschelon Features
Pricing As of 11/14/00

Features	USOC	Type	AZ Phoenix	CO Denver	MN Minneapolis	OR Portland	WA Seattle
Business Complete a Call	DC5RC	DA	$ 0.3500	$ -	$ 0.3500	$ 0.3500	$ -
Call Reject	NSY	CLASS	$ 2 1880	$ 1.8345	$ 2.1728	$ 2.2239	$ 2.1552
Call Trace Blocking	HBG	CLASS					
Caller ID Number	NSD	CLASS	$ 0 0863	$ 0.0864	$ 0.0898	$ 0.0907	$ 0.0895
Caller ID Name and Number	NNK	CLASS	$ 0 3144	$ 0.3052	$ 0.3244	$ 0.3284	$ 0.3230
Caller ID Block Per Line	NKS	CLASS	$ 0.4377	$ 0.3932	$ 0.4424	$ 0.4505	$ 0.4396
Circular Hunt	HCKPG		$ 0.0642	$ 0.0685	$ 0.0661	$ 0.0661	$ 0.0661
Collect & Third Party Block	RTVXQ	Toll Block					
Complete a Call Block		DA					
Continuous Redial Blocking	HBQ	CLASS					
Continuous Redial	NSS	CLASS	$ 0.9562	$ 0 8244	$ 0.9563	$ 0.9767	$ 0.9492
Custom Ringing	RGG1A-RGG3C	CLASS	$ 0.0500	$ 0 0500	$ 0.0600	$ 0.0500	$ 0.0600
Deny 3-way Calling	3BL	Custom Calling					
Deny Continuous Redial	HBQ	CLASS					
Hunting	HTG	HUNTING	$ 0 0614	$ 0.0614	$ 0.0614	$ 0.0614	$ 0.0614
Last Call Return Block	HBS	CLASS					
Permanent Line Blocking	Unable to locate feature						
Series Completion Hunting	HSO	HUNTING	$ 0.0678	$ 0.0718	$ 0.0701	$ 0 0701	$ 0.0701
Voice Messaging Service							
Business Voice Messaging	BVMS	Enhanced	12 75	12 75	12.75	12 75	12.75
DSL Service							
Select DSL Service	HFB		19 95	19 95	19.95	19.95	19.95
Deluxe DSL Service	HFB		29.95	29 95	29.95	29 95	29.95

All rates are subject to change pending filing and approval by state commisions.

* Further discussion needed to better understand business requirement

INTERCONNECTION AGREEMENT AMENDMENT TERMS

This Amendment Agreement ("Amendment") is made and entered into by and between Eschelon Telecom, Inc., and its subsidiaries, ("Eschelon") and Qwest Corporation ("Qwest") (collectively, the "Parties") on this 15th day of November, 2000.

The Parties agree to file this Amendment as an amendment to all Interconnection Agreements ("Agreements" and, singularly, "Agreement") that they are currently operating under or that they may enter into prior to December 31, 2005, with the Amendment containing the following provisions:

1. This Amendment is entered into between the Parties based on the following conditions, with such conditions being integrally and inextricably a material part of this agreement:

1.1 Within 30 days of the Parties' execution of this Amendment, Eschelon agrees to have purchased, and to continue to purchase throughout the terms of this Amendment, at least 50,000 access lines from Qwest (throughout the 14-state area where Qwest is an incumbent local exchange carrier), all of which are to be business lines, not residential lines. "Access lines" include lines purchased for unbundled loops, whether purchased alone or in combination with other network elements

1.2 Qwest and Eschelon agree, that within 30 days of the Parties' execution of this Amendment, they will execute an agreement, on a region-wide basis, for the exchange of local traffic, including Internet-related traffic, on a "bill and keep" basis, that provides for the mutual recovery of costs through the offsetting of reciprocal obligations for local exchange traffic that originates with a customer of one company and terminates to a customer of the other company provided, however, that these provisions will not affect or avoid the obligations to pay the rates set out on Attachment 3.2.

1.3 The Parties wish to establish a business-to-business relationship and have agreed that they will attempt to resolve all differences or issues that may arise under the Agreements or this Amendment under an escalation process to be established between the Parties.

1.4 The Parties agree that the terms and conditions contained in this Amendment are based on Eschelon's current characteristics, which include service to business and Centrex-related customers and includes a fair representation of all businesses, with no large proportion of usage going to a particular type of business.

1.5 The Parties agree that the terms and conditions contained in this Amendment are based on the characteristics of Eschelon's service, which does not include identifiable usage by any particular type of user.

1.6 This Amendment shall be deemed effective on October 1, 2000, subject to approval by the appropriate state commissions, and the Parties agree to implement the terms of the Amendment effective October 1, 2000. This Amendment will be incorporated in any future Agreements, but nothing in any new Agreement will extend the termination date of this Amendment or its terms beyond the term provided herein. Nothing in this Amendment will extend the term of any existing interconnection agreement. This Amendment and the underlying Agreements shall be binding on Qwest and Eschelon and their subsidiaries, successors and assigns.

1.7 In interpreting this Amendment, all attempts will be made to read the provisions of this Amendment consistent with the underlying Agreements and all effective amendments. In the event that there is a conflict between this Amendment and an Agreement or previous amendments, the terms and conditions of this Amendment shall supersede all previous documents.

1.8 Except as modified herein, the provisions of the Agreements shall remain in full force and effect. This Amendment may not be further amended or altered except by written instrument executed by an authorized representative of both Parties. This specifically excludes amendments resulting from regulatory or judicial decisions regarding pricing of unbundled network elements, which shall have no effect on the pricing offered under this Amendment, prior to termination of this Amendment.

1.9 The Parties intend that this Amendment be effective as of October 1, 2000, and have executed the Agreement in multiple counterparts, each of which is deemed an original, but all of which shall constitute one and the same instrument.

1.10 Unless terminated as provided in this section, the term of this Amendment is from October 1, 2000 until December 31, 2005. This Amendment can be terminated only in the event that both Parties agree in writing.

1.11 In the event of termination, the pricing, terms, and conditions for all services and network elements purchased under this Amendment shall immediately be converted, at the option of Eschelon, to either prevailing prices for combinations of network elements, or to retail services purchased at the prevailing wholesale discount. In either case, if and to the extent conversion of service is necessary, reasonable and appropriate cost based nonrecurring conversion and/or nonrecurring charges will apply.

1.12 All factual preconditions and duties set forth in this Amendment are intended to be, and are considered by the Parties to be, reasonably related to, and dependent upon each other.

1.13 To the extent any Agreement does not contain a force majeure provision, then if either Party's performance of this Amendment or any obligation under this Amendment is prevented, restricted or interfered with by causes beyond such Parties reasonable control, including but not limited to acts of God, fire, explosion, vandalism

which reasonable precautions could not protect against, storm or other similar occurrence, any law, order, regulation, direction, action or request of any unit of federal, state or local government, or of any civil or military authority, or by national emergencies, insurrections, riots, wars, strikes or work stoppages or material vendor failures, or cable cuts, then such Party shall be excused from such performance on a day-to-day basis to the extent of such prevention, restriction or interference (a "Force Majeure").

1.14 Neither Party will present itself as representing or jointly marketing services with the other, or market its services using the name of the other Party, without the prior written consent of the other Party.

1.15 This Amendment may be executed in counterparts and by facsimile.

2. In consideration of the agreements and covenants set forth above and the entire group of covenants provided in section 3, all taken as a whole and fully integrated with the terms and conditions described below and throughout this Amendment, with such consideration only being adequate if all such agreements and covenants are made and are enforceable, Eschelon agrees to the following:

2.1 To pay Qwest $10 million to convert to the Platform and to be released from any termination liabilities associated with Eschelon's existing contracts for resold services with Qwest as set out in the Attachment to section 3.2.

2.2 To purchase from Qwest during the term of this Amendment, at least $150 million worth of services and elements (the "Services"). Based on all the terms and conditions contained herein, including the purchase commitment of $150 million, Eschelon may also purchase from Qwest, on a Platform basis and at retail rates, DSL and voice messaging service.

2.3 As set forth in section 1.1 of this Amendment, Eschelon agrees to purchase from Qwest, during each of the five calendar years of this Amendment, a minimum of 50,000 business access lines, and to maintain on Qwest access lines to end users at least 80% (in terms of physical facilities) of Eschelon's local exchange service in the region where Qwest is the incumbent local exchange carrier. In addition, by December 31, 2001, Eschelon agrees that at least 1000 business access lines will be maintained in at least eight of the eleven markets (Minneapolis, St. Paul, Seattle, Tacoma, Portland, Salem, Eugene, Denver, Boulder, Salt Lake City, Phoenix) in which Eschelon is doing business and Qwest is the incumbent local exchange carrier. Eschelon further agrees that it will meet or exceed the following schedule of growth in its purchase of business access lines:

2.8 Beginning January 1, 2001, to provide Qwest with rolling 12 month forecasted volumes, including access line volumes, to the central office level, updated quarterly, and where marketing campaigns are conducted.

2.9 To hold Qwest harmless in the event of disputes between Eschelon and other carriers regarding the billing of access or other charges associated with usage measured by a Qwest switch, provided that Qwest cooperates in any investigation related to such a dispute to the extent necessary to determine the type and accuracy of such usage.

2.10 For at least a one-year period, Eschelon agrees to pay Qwest for the services of a Qwest dedicated provisioning team to work on Eschelon's premises.

2.11 For at least a six week period, Eschelon agrees to participate with Qwest in a loop cutover trial.

3. In consideration of the agreements and covenants set forth above and the entire group of covenants provided in section 2, all taken as a whole and fully integrated with the terms and conditions described below and throughout this Amendment, with such consideration only being adequate if all such agreements and covenants are made and are enforceable, Qwest agrees to the following:

3.1 In consideration for Eschelon's agreement in section 2.1 of this agreement, to waive and release all charges associated with conversion from resold services to the unbundled network platform and for terminating Eschelon contracts for services purchased from Qwest for resale as described in this Amendment.

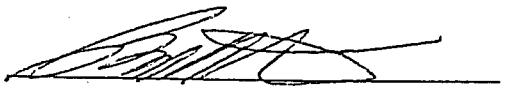
3.2 To provide throughout the term of this Amendment the Platform described herein and in Attachment 3.2, regardless of regulatory or judicial decisions on components, including pricing, of an unbundled network element platform, upon the rates, terms and conditions in the Attachment to section 3.2.

3.3 To provide daily usage information to Eschelon for the working telephone numbers supplied to Qwest by Eschelon, so that Eschelon can bill interexchange or other companies switched access or other rates as appropriate.

3.4 As described in section 1.2 of this agreement, to reach agreement and remain on a "bill and keep" basis for the exchange of local traffic and Internet-related traffic with Eschelon, throughout the territories where Qwest is currently the incumbent local exchange service provider until December 31, 2005.

3.5 To provide electronic interfaces to adequately support the product described in the Attachment to section 3.2.

Eschelon Telecom, Inc.



Authorized Signature

Richard A. Smith

Name Printed/Typed

President - COO

Title

11/15/00

Date

Qwest Corporation

Authorized Signature

Name Printed/Typed

Title

Date

Eschelon Telecom, Inc.

_____
Authorized Signature

_____
Name Printed/Typed

_____
Title

_____
Date

Qwest Corporation

_____
Authorized Signature

GREG CASEY
Name Printed/Typed

EVP
Title

11-15-00
Date

Approved as to legal form

NOV 15 2000

Attachment 3.2

I. Performance by Eschelon of the covenants and agreements in sections 1 and 2 of the Amendment to which this Attachment is a part.

II. Performance by Qwest of the covenants and agreements in sections 1 and 3 of the Amendment to which this Attachment is a part.

III. State rates for lines, adjustments, charges, other terms and conditions, included and excluded platform features, are at the end of this attachment, and are subject to and clarified by the following:

A. In determining statewide usage Eschelon agrees to allow Qwest to audit its records of usage of the platform on a quarterly basis (or other agreed upon measurement period). If statewide average usage exceeds the 525 originating local minutes per month per line for a three month period (or such other agreed upon measurement period) on a state-by-state basis, all platform service shall be increased by the appropriate increment. The first incremental audit will be conducted during December 2000 (or at such other time as the Parties mutually agree). If average usage is above 525 originating local minutes on a statewide basis, the incremental usage element will not be applied for January, February and March usage for that state. The second incremental audit will be conducted in March of 2001 based upon December, January and February usage (or at such other time as the Parties mutually agree). If the average statewide usage is above 525 originating local minutes for that quarter, then the appropriate increment usage element(s) will be applied to April, May and June usage for that state. All audits will follow on a rolling quarterly basis (or other agreed upon measurement period), and all increments shall be applied on a rolling basis. Qwest will review with Eschelon the results of its audits of the local usage, and provide Eschelon with its audit reports, if any.

B. The rates provided for by this platform do not apply to usage associated with toll traffic. Additional local usage charges will apply to usage associated with toll traffic.

C. Platform rates include only one primary directory listing per telephone number.

D. Voice messaging service and DSL service are available in combination with Platform orders at retail rates, and such availability is conditioned on paragraph I above.

E. Rates associated with miscellaneous charges, or new governmental mandates, shall be passed through to Eschelon, as appropriate.

F. The Platform rates provided for in this Amendment shall only apply to

additions to existing CENTREX common blocks established prior October 1, 2000, and only apply to business local exchange customers served through the unbundled network element platform where facilities exist. Appropriate charges for any new CENTREX-related services or augments where facilities do not exist will apply. This Amendment only applies to platform services provided for business users and users of existing CENTREX common blocks. Qwest will not provide Eschelon any new CENTREX common blocks.

G. Any features or functions not explicitly provided for in this Amendment shall be provided only for a charge (both recurring and nonrecurring), based upon established rates and only in accordance with the terms and conditions of the appropriate tariff or Agreement for the applicable jurisdiction.

H. Beginning January 1, 2001, Eschelon shall provide Qwest with rolling 12 month forecasted volumes, including access line volumes, to the central office level, updated quarterly, and where marketing campaigns are conducted.

Attachment 3.2

PRICES FOR OFFERING

STATE	PLATFORM RECURRING	ADDITIONAL CHARGE FOR EACH 50 MINUTE INCREMENT > 525 ORIGNATING LOCAL MOU/MONTH PER LINE
AZ	30.80	0.280
CO	34.00	0.295
ID	33.15	0.295
MN	27.00	0.205
ND	28.30	0.260
NE	35.95	0.300
NM	27.15	0.140
OR	26.90	0.170
UT	22.60	0.270
WA	24.00	0.195

Features (in all forms of the following, except as part of an enhanced service) included in flat-rated UNE-Business

Call Hold
Call Transfer
Three-Way Calling
Call Pickup
Call Waiting/Cancel Call Waiting
Distinctive Ringing
Speed Call Long – Customer Change
Station Dial Conferencing (6 way)
Call Forwarding Busy Line
Call Forwarding Don't Answer
Call Forwarding Variable
Call Forwarding Variable Remote
Call Park (Basic – Store & Retrieve)
Message Waiting Indication A/V

Attachment 3.2

Features in all forms of the following, except as part of an enhanced service) included in existing Centrex Common Blocks

Call Hold
Call Transfer
Three-Way Calling
Call Pickup
Call Waiting/Cancel Call Waiting
Distinctive Ringing
Speed Call Long – Customer Change
Station Dial Conferencing (6-Way)
Call Forwarding Busy Line
Call Forwarding Don't Answer
Call Forwarding Variable
Call Park (Basic – Store & Retrieve)
Message Waiting Indication A/V
Centrex Management System (CMS)
Station Message Detail Recording (SMDS)
Data Call Protection
Hunting
Individual Line Billing
Intercept
Instrasystem Calling
Intercom
Night Service
Outgoing Trunk Queuing
Line Restrictions
Touch Tone
Directed Call Pickup
AIOD
Dial 0
Automatic Call Back Ring Again
Direct Inward Dialing
Direct Outward Dialing
Executive Busy Override
Last Number Redial
Make Set Busy
Network Speed Call
Primary Listing

Pickens, Bob E.

From: Arturo Ibarra Jr [aibarra@uswest.com]
Sent: Tuesday, November 14, 2000 2:16 PM
To: bepickens@eschelon.com
Cc: Freddi Pennington
Subject: Re: Features Available With "UNE-E"

Bob,

To the extent that a feature applies to a 1FB line, you are correct on both accounts. Let me know if you have additional questions.

Thanks,
Arturo

Freddi Pennington wrote:

> Arturo:
>
> Would you be willing to address these questions.
>
> Thanks!
>
> Freddi
> ---------- Forwarded by Freddi Pennington/GROUPWARE/USWEST/US on
> 11/13/2000 03:27 PM ----------
>
> "Pickens, Bob E." <bepickens@eschelon.com> on 11/13/2000 03:53:23 PM
>
>
>
> To: "'Freddi Pennington'" <ppennin@uswest.com>
>
> cc:
>
>
>
> Subject: Features Available With "UNE-E"
>
>
> Freddi--
>
> Just a clarifying point...I did not include features on my list that I'm
> assuming by the language in our agreement are part of our standard feature
> packages. For example, Call Forward Busy Line (Expanded) is a feature that
> does not show up on the standard feature list in the agreement; however, I'm
> assuming it would still be "no charge" as Call Forward Busy Line is listed
> as a "no charge" feature and language in the agreement states "Features (in
> all forms of the following)". Could you please confirm this to be the fact?
>
> Also, I see Call Pick-up is part of the standard feature package; I'm
> assuming Call Pick-up Group, Call Pick-up Station and other forms of Call
> Pick-up are included as well. Again, could you please confirm this
> assumption?
>
> Bob

Pickens, Bob E.

From: Pickens, Bob E.
Sent: Monday, November 13, 2000 2:35 PM
To: 'ppennin@uswest.com'
Subject: USOCs

Freddi:

Below are the features description along with the USOCs that define them. I'm being told by my product people that POTS and Centrex 21 often use different USOCs. Where I've been able to locate different USOCs between POTS and Centrex 21, I've listed them below. Please let me know if the price will differ depending on if the feature is on a Centrex 21 line or a POTs line. Also, I'm noting that Consultation Hold does not show up as a standard feature for either centrex or 1fb service in our proposed new agreement. I'm assuming it is available at no charge as until you add another caller on to a three way call you essentially have consultation hold. Could you please confirm for me that is they way it will work??

Business Complete a Call	DC5RC
Call Block Trace	HBG
Call Reject	NSY
Call Trace Blocking	HBG (I believe this to be the same as call block trace)
Caller ID Number	NSD
Caller ID Name and Number	NNK also C4Z for Centrex 21
Caller ID Block Per Line	Can't find (may not be a charge for blocking??)
Circular Hunt	HCKPG also CHTG for Centrex 21
Collect & Third Party Block	RTVXQ
Complete a Call Block	Can't find (may not be a charge for blocking??)
Continuous Redial Blocking	Can't find (may not be a charge for blocking??)
Continuous Redial	NSS
Custom Ringing	Several (RGG1A, 1B, 1C, 2A, 2B, 2C, 3A, 3B, 3C)
Deny 3-way Calling	3BL
Deny Continuous Redial	HBQ
Deny Last Call Return	HBS
Hunting	HTG
Last Call Return Blocking	Can't find (may not be a charge for blocking??)
Permanent Line Blocking	Can't find (may not be a charge for blocking??)
Series Completion Hunting	SCHTG (I can only find this on Centrex 21 accounts)

Also, what about directory listing charges--we assume we get the first one free. Could you please confirm this to be the case?

What would the cost be for:

Additional Directory Listing
Foreign Directory Listing
Extra Line Listing

Bob Pickens
Executive Vice President, Marketing
Eschelon Telecom, Inc.
(612) 436-6604

STATE OF MINNESOTA)
) ss
COUNTY OF HENNEPIN)

AFFIDAVIT OF BOB PICKENS

I, Bob Pickens having been properly sworn, depose and state the following is based on personal knowledge and belief:

1. I am Executive Vice President of Marketing for Eschelon Telecom, Inc.

2. On November 15 of 2000, Eschelon and Qwest entered into an amendment to their interconnection agreement (Amendment No. 7 to the Eschelon/Qwest Interconnection Agreement in Arizona), which has become known as the "UNE-E" Amendment.

3. The UNE-E Amendment provided, at ¶ G of Attachment 3.2, that "features or functions not explicitly provided for in this Amendment shall be provided for a charge (both recurring and nonrecurring), based upon established rates and only in accordance with the terms and conditions of the appropriate tariff or Agreement for the applicable jurisdiction."

4. As that amendment was being finalized, on November 13 and 14 of 2000 I exchanged e-mails, attached to this Exhibit 5, with Freddi Pennington of Qwest. In these emails, in an effort to find specifically what rates were applicable, I asked several questions about what specific prices Qwest contended would be applicable to certain features or functions not explicitly provided for in the Amendment.

5. On November 15, 2000, Freddi Pennington of Qwest replied with a list of prices that Qwest claimed would apply to the features and functions I inquired about (Ex. 3). In it Qwest claimed that the rates contained therein were either rates that were the publicly filed and approved rates for these features or were Qwest proposed rates that had not been approved by the state commissions.

6. After some research and internal discussion at Eschelon it was our position that many of these rates were not applicable or had not been approved by any commission and thus did not meet the conditions stated in the UNE-E Amendment.

7. Therefore, Eschelon took the position as to those features not explicitly included in the UNE-E Amendment, that unless and until they were approved by the applicable state commission Qwest could not charge these rates under the UNE-E amendment.

8. Subsequently, on July 31, 2001, Eschelon and Qwest reached agreement on recurring and non-recurring rates and the features to which they applied in connection with the UNE-E Amendment. Those agreements were filed as amendments to the parties' Arizona interconnection agreement (Exhibits 6 & 7).

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 17 day of August, 2004, in Minneapolis, Minnesota.

Bob Pickens

Subscribed and sworn to before me this 18th day of August, 2004.

TOBE L. GOLDBERG
NOTARY PUBLIC – MINNESOTA
My Comm. Expires Jan. 31, 2005

Notary Public 8/18/04

Amendment No. ____ to the Interconnection Agreement
Between Eschelon Telecom, Inc.
and Qwest Corporation
in the State of _____

This Amendment No. ("Amendment") is made and entered into by and between Eschelon Telecom, Inc. ("Eschelon") and Qwest Corporation, formerly U S WEST Communications, Inc. ("Qwest"). Eschelon and Qwest may be referenced through this Amendment as the "Parties."

Recitals

WHEREAS, Eschelon and Qwest entered into that certain Interconnection Agreement for service in the state of _____, which was approved by _____ on _____ (the "Agreement"); and

WHEREAS, Eschelon and Qwest wish to amend the Agreement under the terms and conditions contained herein.

NOW THEREFORE, the Parties agree to the following:

Amendment

NOW THEREFORE, in consideration of the mutual terms, covenants and conditions contained in this Amendment and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. **Amendment Purpose.**

This Amendment is for the purpose of amending the monthly recurring charges provided in connection with the Unbundled Network Element Platform ("UNE-P") and the features available on a flat-rated basis with UNE-P.

2. **Amendment Terms**

The Agreement is amended by adding the following paragraphs:

2.1 The rates and features attached to Attachment 3.2 to the Interconnection Agreement Amendment Terms between Qwest and Eschelon, dated November 15, 2000, are deleted and replaced with rates and features attached hereto.

2.2 Basis for Charges. Eschelon has provided to Qwest forecasts of Eschelon's feature usage. That feature usage reflects Eschelon's anticipated demand for its specific product offerings, such as Eschelon Advantage, and the nature of Eschelon's customer base, which includes small to medium business customers in several of Qwest's markets. The features included in the flat-rated UNE-P Business recurring rates reflect Eschelon's current and projected feature

usage. If actual usage changes materially, the Parties agree to negotiate in good faith any changes in the rate necessary to account for such change. As part of this Amendment and based on Eschelon's customer profile and anticipated feature usage, Eschelon may purchase Advanced Intelligent Network ("AIN") features to be placed on UNE-P at retail rates not to exceed commission approved rates, including recurring and non-recurring charges, if any.

3. Effective Date

This Amendment shall be deemed effective upon approval by the _____ Commission; however, the Parties agree to implement the provisions of this Amendment effective on July 1, 2001.

4. Further Amendments

Except as provided in this Amendment, the provisions of the Agreement (as previously amended) shall remain in full force and effect. Except as provided in the Agreement, this Amendment may be further amended or altered only by a written instrument executed by an authorized representative of both Parties.

The Parties intending to be legally bound have executed this Amendment as of the dates set forth below, in multiple counterparts, each of which is deemed an original, but all of which shall constitute one and the same instrument.

Eschelon Telecom, Inc.

Signature

Richard A. Smith
Name Printed/Typed

President and COO
Title

July 31, 2001
Date

Qwest Corporation

Signature

Audrey McKenney
Name Printed/Typed

SVP - Wholesale Mkts
Title

July 31, 2001
Date

AMENDED ATTACHMENT 3.2

PRICES FOR OFFERING

STATE	PLATFORM RECURRING	ADDITIONAL CHARGE FOR EACH 50 MINUTE INCREMENT > 525 ORIGNATING LOCAL MOU/MONTH PER LINE
AZ	31.15	0.280
CO	34.35	0.295
ID	33.50	0.295
MN	27.35	0.205
ND	28.65	0.260
NE	36.30	0.300
NM	27.50	0.140
OR	27.25	0.170
UT	22.95	0.270
WA	24.35	0.195

Exhibit A sets forth features that are included in the flat-rated UNE-P Business Recurring Rate, in all forms of those features (except as part of an enhanced service).

EXHIBIT A

Features Available On Various Service Platforms And Included In The Flat Rated UNE-P Business Recurring Charge (except as noted below)

	1FB POTS	1FB POTS w/CCMS	CTX21	Centron	Centrex +
Call Hold (Hard)		X	X	X	X
Consultation Hold (Soft)		X	X	X	X
Call Transfer	X	X	X	X	X
3-way Calling	X	X	X	X	X
Call Pickup (Group and Station)		X	X	X	X
Call Waiting/Cancel Call Waiting	X	X	X	X	X
Distinctive Ring	X	X	X	X	X
Speed Call Long - Customer Change	X	X	X	X	X
Station Dial Conferencing (6-way)		X	X	X	X
Call Fwd Busy Line	X	X	X	X	X
Call Fwd Busy Line Expanded	X	X	X	X	X
Call Fwd Busy Line / Don't Answer	X	X	X	X	X
Call Fwd Don't Answer	X	X	X	X	X
Call Fwd Busy (External) Don't Answer	X	X	X	X	X
Call Fwd Busy (Overflow) Don't Answer	X	X	X	X	X
Call Fwd Busy External	X	X	X	X	X
Call Fwd Variable	X	X	X	X	X
Call Park			X	X	X*
MWI A/V	X	X	X	X	X
Centrex Management System (CMS)				X	X
Station Message Detail Recording (SMDR)				X	X
Hunting	X	X	X	X	X
Individual Line Billing	X	X	X	X	X
Intercept	X	X	X	X	X
Intrasystem Calling				X	X
Intercom				X	X
Night Service				X	X
Outgoing Trunk Queing				X	X
Line Restrictions**				X	X
Touch Tone	X	X	X	X	X
AIOD	X	X	X	X	X
Dial 0				X	X
DID				X	X
DOD				X	X
Automatic Call Back Ring Again				X	X
Executive Busy Override				X	X*
Last Number Redial				X	X*
Make Set Busy				X	X
Network Speed Call				X	X*
Collect & 3rd Party Block	X	X	X	X	X
Custom Ringing	X	X	X	X	X
3-Way Call Blocking	X				
Business Complete a Call	X	X	X	X	X
Complete A Call Block	X	X	X	X	X
CLASS					
Anonymous Call Rejection	X	X	X	X	X
Call # Delivery Blocking (CID Blocking)	X	X	X	X	X
Call Trace Blocking	X	X	X	X	X
CID # only	X	X	X	X	X
CID Name & Number	X	X	X	X	X
CID on CW	X	X	X	X	X
Continuous Redial	X	X	X	X	X
Continuous Redial Blocking	X	X	X	X	X
Last Call Return	X	X	X	X	X
Last Call Return Blocking	X	X	X	X	X
Priority Calling	X	X	X	X	X
Selective Call Forwarding	X	X	X	X	X
Selective Call Rejection	X	X	X	X	X
Listings					
Primary Listing	X	X	X	X	X
Additional Listing (CLT)	X	X	X	X	X
Foreign Directory Listing (FAL)	X	X	X	X	X
If No Answer Listing (FNA)	X	X	X	X	X
Joint User Listing (JUL)	X	X	X	X	X
Non Listing No Change (NLE)	X	X	X	X	X
Non Listing (NLT)	X	X	X	X	X
Non Published No Change (NP3)	X	X	X	X	X
Non Published (NPU)	X	X	X	X	X
Extra Line Listing (XLL)	X	X	X	X	X
Charge Listing, Business Client (LBS)	X	X	X	X	X

The Following Are Available At Retail Rates Not to Exceed Commission Approved Rates

AIN @ Retail					
Remote Access Forwarding (AFD)	X	X	X	X	X
Scheduled Forwarding (ATF)	X	X	X	X	X
Dial Lock (DCA)	X	X	X	X	X
Do Not Disturb (D7T)	X	X	X	X	X

*New features that require special assembly will be assessed a one-time, cost-based special assembly charge not to exceed commission approved rates.
**Existing quantities are grandparented. New quantities will be billed at appropriate rates.

Amendment No. ____ to the Interconnection Agreement Between Eschelon Telecom, Inc. and Qwest Corporation in the State of

This Amendment No. ("Amendment") is made and entered into by and between Eschelon Telecom, Inc. ("Eschelon") and Qwest Corporation, formerly U S WEST Communications, Inc. ("Qwest"). Eschelon and Qwest may be referenced through this Amendment as the "Parties."

Recitals

WHEREAS, Eschelon and Qwest entered into that certain Interconnection Agreement for service in the state of _____, which was approved by_____ _____ on _____ (the "Agreement"); and

WHEREAS, Eschelon and Qwest wish to amend the Agreement under the terms and conditions contained herein.

NOW THEREFORE, the Parties agree to the following:

Amendment

NOW THEREFORE, in consideration of the mutual terms, covenants and conditions contained in this Amendment and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. Amendment Purpose.

This Amendment is for the purpose of amending the Agreement to establish the Non-recurring charges for Unbundled Network Element Platform ("UNE-P").

2. Amendment Terms

2.1 The Agreement is amended by adding the following additional paragraphs:

Non-Recurring Charges for Eschelon UNE-P.

2.1.1. Definitions. For purposes of this Amendment, "class of service" will refer to one of the following three classes of service:

(a) 1FB, including when ordered with Customer Calling Management System ("CCMS") (*i.e.*, the ordering of CCMS with 1FB does not constitute a change of class of service from 1FB with or without CCMS for billing purposes, so the charge does not apply).

(b) Centrex 21.

(c) Centrex+/Centron (including Centron Standard Station, Centron Basic Station, Centron Feature Package, and Centron Optional Features).

Utilities Division Staff v. Eschelon Telecom of Arizona, Inc.
Docket No. T-03406A-03-0888
Exhibit 8

2.1.2. Conversion of End User Customer With Existing Service to Eschelon UNE-P lines. If an end user with existing class of service selects Eschelon as its provider, Eschelon will pay a non-recurring charge of $ 7.60 for the first UNE-P line and $1.43 for each additional UNE-P line to serve the end user at the same service address with the same class of service. Separate end users at the same service address, if any, each will be subject to separate non-recurring charges, if applicable.

2.1.3. Provisioning of UNE-P Where there is no Existing Service or Where there is a Change in Class of Service. When Eschelon orders a UNE-P line to serve an end user where there is no existing service, where there is no existing service of the same class of service, or where the number of UNE-P lines ordered by Eschelon is greater than the number of existing lines of the same class of service at the same service address, Eschelon will pay a non-recurring charge of $69.00 for the first new UNE-P line and $17.75 for each additional new UNE-P line located at the same service address and ordered at the same time, provided these charges do not exceed commission approved rates. Separate end users at the same service address, if any, each will be subject to separate non-recurring charges, if applicable. The ordering of CCMS with 1FB does not constitute a change of class of service from UNE-P on a 1FB line for billing purposes, so the charge does not apply.

2.1.4. Subsequent Ordering of Feature Changes or Additional Features. When Eschelon orders either a change features (excluding deletions) or additional features for an Eschelon end user provisioned through UNE-P after the initial installation of UNE-P lines, for each UNE-P line to which an additional feature is subsequently added on the same class of service, Eschelon will pay a non-recurring charge of $7.60 for the first feature and $1.43 for each additional feature. Separate end users at the same service address, if any, each will be subject to separate non-recurring charges, if applicable.

2.1.5. Effective Date of Rates. The rates set forth on herein shall be effective as of September 1, 2001.

2.2 The Agreement is amended by adding the following additional paragraph:

Features available with UNE-P

Exhibit A to Amended Attachment 3.2 (copy attached) sets forth features which are available, in all forms of that feature, with UNE-P, as well as on which platform they are available. The list of features set forth in Exhibit A is not exclusive. Qwest will make additional features available to Eschelon with UNE-P, as they are, or become, available, at appropriate non-recurring rates, if any.

3. Effective Date

This Amendment shall be deemed effective upon approval by the _____ Commission; however, the Parties agree to implement the provisions of this Amendment upon execution.

4. **Further Amendments**

Except as provided in this Amendment, the provisions of the Agreement (as previously amended) shall remain in full force and effect. Except as provided in the Agreement, this Amendment may be further amended or altered only by a written instrument executed by an authorized representative of both Parties.

The Parties intending to be legally bound have executed this Amendment as of the dates set forth below, in multiple counterparts, each of which is deemed an original, but all of which shall constitute one and the same instrument.

Eschelon Telecom, Inc.	**Qwest Corporation**
Signature	Signature
Richard A. Smith	Audrey McKenney
Name Printed/Typed	Name Printed/Typed
President and COO	SVP - Wholesale Markets
Title	Title
July 31, 2001	July 31, 2001
Date	Date

EXHIBIT A

Features Available On Various Service Platforms And Included In The Flat Rated UNE-P Business Recurring Charge (except as noted below)

	1FB POTS	1FB POTS w/CCMS	CTX21	Centron	Centrex 4
Call Hold (Hard)		X	X	X	X
Consultation Hold (Soft)		X	X	X	X
Call Transfer	X	X	X	X	X
3-way Calling	X	X	X	X	X
Call Pickup (Group and Station)		X	X	X	X
Call Waiting/Cancel Call Waiting	X	X	X	X	X
Distinctive Ring	X	X	X	X	X
Speed Call Long - Customer Change	X	X	X	X	X
Station Dial Conferencing (6-way)		X	X	X	X
Call Fwd Busy Line	X	X	X	X	X
Call Fwd Busy Line Expanded	X	X	X	X	X
Call Fwd Busy Line / Don't Answer	X	X	X	X	X
Call Fwd Don't Answer	X	X	X	X	X
Call Fwd Busy (External) Don't Answer	X	X	X	X	X
Call Fwd Busy (Overflow) Don't Answer	X	X	X	X	X
Call Fwd Busy External	X	X	X	X	X
Call Fwd Variable	X	X	X	X	X
Call Park			X	X	X*
MWI A/V	X	X	X	X	X
Centrex Management System (CMS)				X	X
Station Message Detail Recording (SMDR)				X	X
Hunting	X	X	X	X	X
Individual Line Billing	X	X	X	X	X
Intercept	X	X	X	X	X
Intrasystem Calling				X	X
Intercom				X	X
Night Service				X	X
Outgoing Trunk Queing				X	X
Line Restrictions**				X	X
Touch Tone	X	X	X	X	X
AIOD	X	X	X	X	X
Dial 0				X	X
DIB				X	X
DOD				X	X
Automatic Call Back Ring Again				X	X
Executive Busy Override				X	X*
Last Number Redial				X	X*
Make Set Busy				X	X
Network Speed Call				X	X*
Collect & 3rd Party Block	X	X	X	X	X
Custom Ringing	X	X	X	X	X
3-Way Call Blocking	X				
Business Complete a Call	X	X	X	X	X
Complete A Call Block	X	X	X	X	X
CLASS					
Anonymous Call Rejection	X	X	X	X	X
Call # Delivery Blocking (CID Blocking)	X	X	X	X	X
Call Trace Blocking	X	X	X	X	X
CID # only	X	X	X	X	X
CID Name & Number	X	X	X	X	X
CID on CW	X	X	X	X	X
Continuous Redial	X	X	X	X	X
Continuous Redial Blocking	X	X	X	X	X
Last Call Return	X	X	X	X	X
Last Call Return Blocking	X	X	X	X	X
Priority Calling	X	X	X	X	X
Selective Call Forwarding	X	X	X	X	X
Selective Call Rejection	X	X	X	X	X
Listings					
Primary Listing	X	X	X	X	X
Additional Listing (CLT)	X	X	X	X	X
Foreign Directory Listing (FAL)	X	X	X	X	X
If No Answer Listing (FNA)	X	X	X	X	X
Joint User Listing (JUL)	X	X	X	X	X
Non Listing No Change (NLE)	X	X	X	X	X
Non Listing (NLT)	X	X	X	X	X
Non Published No Change (NPS)	X	X	X	X	X
Non Published (NPU)	X	X	X	X	X
Extra Line Listing (XLL)	X	X	X	X	X
Change Listing, Business Client (LBS)	X	X	X	X	X

The Following Are Available At Retail Rates Not to Exceed Commission Approved Rates

AIN @ Retail					
Remote Access Forwarding (AFD)	X	X	X	X	X
Scheduled Forwarding (ATF)	X	X	X	X	X
Dial Lock (DC4)	X	X	X	X	X
Do Not Disturb (DTT)	X	X	X	X	X

Jew features that require special assembly will be assessed a one-time, cost-based special assembly charge not to exceed commission approved rates.

*Existing quantities are grandparented. New quantities will be billed at appropriate rates.

SUBJECT TO RULE OF EVIDENCE 408

CONFIDENTIAL BILLING SETTLEMENT AGREEMENT

This Confidential Billing Settlement Agreement ("Agreement"), is hereby entered into by Qwest Corporation ("Qwest") and Eschelon Telecom, Inc., and its subsidiaries, ("Eschelon") (hereinafter referred to as the "Parties" when referred to jointly) on this 15th day of November, 2000.

RECITALS

1. Qwest is an incumbent local exchange provider operating in the states of Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming.

2. Eschelon is a competitive local exchange provider that operates in several states within Qwest's operating region.

3. Whereas both Qwest and Eschelon have entered into interconnection agreements pursuant to the federal Telecommunications Act of 1996 ("Act") under Sections 251 and 252 of that Act, and those agreements have been approved by the appropriate state commissions where those agreements were filed pursuant to the Act. Qwest and Eschelon operate under those agreements.

4. Disputes between the Parties have arisen regarding the provisioning of finished services through unbundled network elements ("UNEs"), and the provisioning of finished service through the UNE platform.

5. In an attempt to finally resolve those issues in dispute and to avoid delay and costly litigation, the Parties voluntarily enter into this Confidential Billing Settlement Agreement to resolve all disputes, claims and controversies between the Parties, as of the date of this Agreement that relate to the matters addressed herein, and Qwest releases Eschelon from any claims regarding the issues as described herein.

CONFIDENTIAL BILLING SETTLEMENT AGREEMENT

1. The Parties enter into this Agreement in consideration for the sum of money described below, and Qwest's release of Eschelon's conversion and termination fees associated with the changes to a new platform which is currently being created by the Parties. As part of the new platform, Qwest will provide elements in combination to Eschelon together with the call origination, call termination, call duration, and call type information to Eschelon.

2. Eschelon shall pay to Qwest an amount of $10,000,000.00 (ten million dollars) no later than November 17, 2000. This amount represents the charges which Qwest claims Eschelon owes it for conversion from resale to unbundled network elements, and for termination liability associated with existing contracts.

3. For valuable consideration mentioned above, the receipt and sufficiency of which are hereby acknowledged, Qwest does hereby release and forever discharge Eschelon and its associates, owners, stockholders, predecessors, successors, agents, directors, officers, partners, employees, representatives, employees of affiliates, employees of parents, employees of subsidiaries, affiliates, parents, subsidiaries, insurance carriers, bonding companies and attorneys, from any and all manner of action or actions, causes or causes of action, in law, under statute, or in equity, suits, appeals, petitions, debts, liens, contracts, agreements, promises, liabilities, claims, affirmative defenses, offsets, demands, damages, losses, costs, claims for restitution, and expenses, of any nature whatsoever, fixed or contingent, known or unknown, past and present asserted or that could have been asserted or could be asserted in any way relating to or arising out of the disputes/matters addressed herein, including all disputes related to the UNE platform and switched access.

4. The terms and conditions contained in this Confidential Billing Settlement Agreement shall inure to the benefit of, and be binding upon, the respective successors, affiliates and assigns of the Parties.

5. Qwest hereby covenants and warrants that it has not assigned or transferred to any person any claim, or portion of any claims which is released or discharged by this Confidential Billing Settlement Agreement.

6. The Parties agree that they will keep the substance of the negotiations and/or conditions of the settlement and the terms or substance of the Confidential Billing Settlement Agreement strictly confidential. The Parties further agree that they will not communicate (orally or in writing) or in any way disclose the substance of the negotiations and/or conditions of the settlement and the terms or substance of this Agreement to any person, judicial or administrate agency or body, business, entity or association or anyone else for any reason whatsoever, without the prior express written consent of the other Party unless compelled to do so by law or unless Eschelon pursues an initial public offering, and then only to the extent that, disclosure by Eschelon is necessary to comply with the requirements of the Securities Act of 1933 or the Securities Exchange Act of 1934. In the event Eschelon pursues an initial public offering, it will: (1) first notify Qwest of any obligation to disclose some or all of this Confidential Agreement; (2) provide Qwest with an opportunity to review and comment on Eschelon's proposed disclosure of some or all of this Confidential Agreement; and (3) apply for confidential treatment of the Confidential Agreement. It is expressly agreed that this confidentiality provision is an

essential element of this Confidential Billing Settlement Agreement and negotiations, and all matters related to these matters, shall be subject to Rule 408 of the Rules of Evidence, at the federal and state level.

7. In the event either Party initiates arbitration or litigation regarding the terms of this agreement or has a legal obligation which requires disclosure of the terms and conditions of this Confidential Billing Settlement Agreement, the Party having the obligation shall immediately notify the other Party in writing of the nature, scope and source of such obligation so as to enable the other Party, at its option, to take such action as may be legally permissible so as to protect the confidentiality provided in this Agreement.

8. This Confidential Billing Settlement Agreement constitutes an agreement between the Parties and can only be changed in a writing or writings executed by both Parties. Each of the Parties forever waives all right to assert that this Confidential Billing Settlement Agreement was the result of a mistake in law or in fact.

9. This Confidential Billing Settlement Agreement shall be interpreted and construed in accordance with the laws of the State of Minnesota, and shall not be interpreted in favor or against any Party to this Agreement.

10. The Parties have entered into this Confidential Billing Settlement Agreement after conferring with legal counsel.

11. In the event that any material provision of this Confidential Billing Settlement Agreement should be declared to be unenforceable by any administrative agency or court of law, either Party may initiate an arbitration under the provisions of paragraph 12 below within 90 days of such declaration, to determine the impact of such declaration on the remainder of this Confidential Billing Settlement Agreement. The arbitrator shall have the authority to determine the materiality of the provision and any appropriate remedies, including voiding the agreement in its entirety. If neither Party initiates such an arbitration within 90 days, the remainder of the Confidential Billing Settlement Agreement shall remain in full force and effect, and shall be binding upon the Parties hereto as if the invalidated provisions were not part of this Confidential Billing Settlement Agreement.

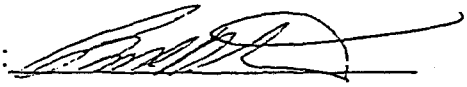
12. Any claim, controversy or dispute between the Parties in connection with this Confidential Billing Settlement Agreement shall be resolved by private and confidential arbitration conducted by a single arbitrator engaged in the practice of law under the then current rules of the American Arbitration Association. The arbitration shall be conducted in Minneapolis, Minnesota. Each party shall have the right to seek from a court of appropriate jurisdiction equitable or provisional remedies (such as temporary restraining orders, temporary injunctions, and the like) before arbitration proceedings have been commenced

and an arbitrator has been selected. Once an arbitrator has been selected and the arbitration proceedings are continuing, thereafter the sole jurisdiction with respect to equitable or provisional remedies shall be remanded to the arbitrator. Any arbitrator shall be a retired judge or an attorney who has been licensed to practice for at least ten (10) years and is currently licensed to practice in the state of Minnesota. The arbitrator shall be selected by the parties within fifteen (15) business days after a request for arbitration has been made by one of the parties hereto. If the parties are unable to agree among themselves, the parties shall ask for a panel of arbitrators to be selected by the American Arbitration Association. If the parties are unable to select a sole arbitrator from the panel supplied by the American Arbitration Association within ten (10) business days after such submission, the American Arbitration Association shall select the sole arbitrator. The Federal Arbitration Act, 9 U.S.C §§ 1-16, not state law, shall govern the arbitratibility of all disputes. The arbitrator shall have the authority to determine breach of this Agreement and award appropriate damages, but the arbitrator shall not have authority to award punitive damages. The arbitrator's decision shall be final and binding and may be entered in any court having jurisdiction thereof. Each Party shall bear its own costs and attorneys' fees and shall share equally in the fees and expenses of the arbitrator except that the arbitrator shall have the discretion to award reasonable attorneys' fees and costs in favor of a Party if, in the opinion of the arbitrator, the dispute arose because the other Party was not acting in good faith.

13. The Parties acknowledge and agree that they have a legitimate billing dispute about the issues described in this Confidential Billing Settlement Agreement and that the resolution reached in this Agreement represents a compromise of the Parties' positions. Therefore, the Parties agree that resolution of the issues contained in this Agreement cannot be used against the other Party, including but not limited to admissions.

14. This Confidential Billing Settlement Agreement may be executed in counterparts and by facsimile.

IN WITNESS THEREOF, the Parties have caused this Confidential Billing Settlement Agreement to be executed as of this 15th day of November 2000.

Eschelon Telecom, Inc.	Qwest Corporation
By: 	By: _____
Title: President - COO	Title: _____
Date: 11/15/00	Date: _____

IN WITNESS THEREOF, the Parties have caused this Confidential Billing Settlement Agreement to be executed as of this 15th day of November 2000.

Eschelon Telecom, Inc.	Qwest Corporation
By: _____	By: _____
Title: _____	Title: EVP
Date: _____	Date: 11-15-00

Approved as to legal form

NOV 15 2000